UNION SALTING OF SMALL BUSINESS WORKSITES

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT & GOVERNMENT PROGRAMS

OF THE

COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

WASHINGTON, DC, FEBRUARY 26, 2004

Serial No. 108–55

Printed for the use of the Committee on Small Business

Available via the World Wide Web: http://www.access.gpo.gov/congress/house

U.S. GOVERNMENT PRINTING OFFICE

93–197 PDF WASHINGTON : 2004

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON SMALL BUSINESS

DONALD A. MANZULLO, Illinois, *Chairman*

ROSCOE BARTLETT, Maryland, *Vice Chairman*
SUE KELLY, New York
STEVE CHABOT, Ohio
PATRICK J. TOOMEY, Pennsylvania
JIM DEMINT, South Carolina
SAM GRAVES, Missouri
EDWARD SCHROCK, Virginia
TODD AKIN, Missouri
SHELLEY MOORE CAPITO, West Virginia
BILL SHUSTER, Pennsylvania
MARILYN MUSGRAVE, Colorado
TRENT FRANKS, Arizona
JIM GERLACH, Pennsylvania
JEB BRADLEY, New Hampshire
BOB BEAUPREZ, Colorado
CHRIS CHOCOLA, Indiana
STEVE KING, Iowa
THADDEUS MCCOTTER, Michigan

NYDIA VELÁZQUEZ, New York
JUANITA MILLENDER-MCDONALD, California
TOM UDALL, New Mexico
FRANK BALLANCE, North Carolina
ENI FALEOMAVAEGA, American Samoa
DONNA CHRISTENSEN, Virgin Islands
DANNY DAVIS, Illinois
GRACE NAPOLITANO, California
ANÍBAL ACEVEDO-VILÁ, Puerto Rico
ED CASE, Hawaii
MADELEINE BORDALLO, Guam
DENISE MAJETTE, Georgia
JIM MARSHALL, Georgia
MICHAEL MICHAUD, Maine
LINDA SANCHEZ, California
BRAD MILLER, North Carolina
[VACANCY]

J. MATTHEW SZYMANSKI, *Chief of Staff and Chief Counsel*
PHIL ESKELAND, *Policy Director*
MICHAEL DAY, *Minority Staff Director*

SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT AND GOVERNMENT PROGRAMS

TODD AKIN, Missouri, *Chairman*
JIM DEMINT, South Carolina
SHELLEY MOORE CAPITO, West Virginia
JEB BRADLEY, New Hampshire
CHRIS CHOCOLA, Indiana
STEVE KING, Iowa
THADDEUS MCCOTTER, Michigan

TOM UDALL, New Mexico
DANNY DAVIS, Illinois
GRACE NAPOLITANO, California
ED CASE, Hawaii
MADELEINE BORDALLO, Guam
[VACANCY]

TOM BEZAS, *Professional Staff*

CONTENTS

WITNESSES

APPENDIX

UNION SALTING OF SMALL BUSINESS WORKSITES

THURSDAY, FEBRUARY 26, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMITTEE ON WORKFORCE, EMPOWERMENT, AND GOVERNMENT PROGRAMS
COMMITTEE ON SMALL BUSINESS
Washington, D.C.

The Committee met, pursuant to call, at 10:40 a.m. in Room 2360, Rayburn House Office Building, Hon. Todd Akin presiding.

Present: Representatives Akin, DeMint, Udall.

Chairman AKIN. I now call this hearing of the Subcomittee on Workforce Empowerment and Government Programs to order.

I am going to read a statement to begin with, and then I believe we will probably go directly to the witness.

Good morning, and thank you for coming to our Subcomittee's first hearing of the 108th Congress, second sessions. For the first hearing of the year I wanted to choose something very significant, something very close to small business owners.

When the issue of salting was chosen for this hearing, I had no idea just how significant it was. Salting, for those of you who don't know, is the act of deliberately inserting a union member, or salt, into a not-yet-unionized company. This salt applies for a position on the worksite, sometimes coming forth as a union member during his or her application process, and sometimes leaving that fact off.

This plant, or salt, seeks a position on the worksite in order to establish a wellspring of support for the union effort, eventually unionizing or organizing that non-union company. This salt is often a member of a local union being paid by that union for his or her services.

Employees often do not know that their new co-worker is also a paid union organizer, and like all salesmen, this new co-worker of theirs will collect a fee on selling these unsuspecting workers on the idea of unionizing.

A salt is often sent in after an honest, forthright attempt to unionize has already failed.

When an employer is confronted by one of these salts, he is put in a lose/lose position. If he does not hire the applicant, the applicant and his union can run to the National Labor Relations Board and file charges of unfair hiring practices. These charges often lead to long and dragged-out costly litigation, which the national unions have plenty of money to support, but small businesses are not equipped for.

With us today are Mr. and Mrs. Cloninger. They will be able to tell us their story, which illustrates exactly what I have explained. Mr. and Mrs. Cloninger should be commended, as well as the other members who have come forth today. Many have not.

My staff and the staff of related organizations contacted many people to participate in today's hearing. Most people were frightened to give testimony. American citizens were frightened to take advantage of their God-given right to speak the truth of what had happened to them.

Why? Why were people so frightened that they declined to appear before the United States Congress?

Actually, they had good reason. It appears that there is something to this salting, for when these people have spoken up before, they have experienced just how vital salting is to the unions. People we have been in contact with told us stories of receiving numerous death threats, having loved ones threatened, and even being run off the road.

Now, I have spent my time dealing with unions before. For years I served in the Missouri State Legislature, and in my time there, I had my share of dealing with unions and their tactics. I know what kinds of threats people are capable of, and understand the concerns and fears of these business owners. Even members of public office are not above the threats of people who would intimidate us.

It is for this reason and many others that I applaud my friend, Congressman Jim DeMint, for proposing this piece of legislation, entitled "Truth in Employment Act of 2003." That is House Resolution 1793.

I would like to thank you, Congressman, for coming to this hearing today and speaking to us about this legislation.

Because of the fact that we have Congressman Toomey here, also, I would recognize Congressman Toomey, if you would like to make a comment.

[Chairman Akin's statement may be found in the appendix.]

Mr. TOOMEY. Thank you, Mr. Chairman. And I would just add very briefly that I am very eager to hear and read the testimony of our witnesses today.

This strikes me as a disturbing practice, the salting practice. It strikes me that way for a variety of reasons, but one of which is that it seems to me—and we will learn better today, I hope—but it seems to me that it is often founded upon a fundamental deceit, a deceit in which an individual approaches a company with the pretense that he or she is there to work, to get paid for his work, and to go home when his work is finished. But in fact, the individual is there with a very different agenda, which is not consistent with that, and which is information withheld from the employer, and from his fellow workers. And I think it ought to be troubling whenever any systematic effort is undertaken that is founded upon deceit.

So I am looking forward to learning whether or not that is true. And I would certainly like to learn whether, and to what extent, individuals are actually frightened or intimidated about simply telling the truth and testifying in public. There is absolutely no place for intimidation in public discourse. So I hope to learn that that is

not the case. But in any case, I am going to be sitting here with open ears to find out.

So thank you very much for having this hearing. And I welcome my colleague, and commend him for his legislation.

Chairman AKIN. Thank you very much, Congressman Toomey. I appreciate having you, and also Congressman DeMint. It has been just such a pleasure serving with both of you gentlemen. And I don't want to take any more time; I would like to give you as much time as you need, Congressman, to explain your legislation, and make your opening statement.

STATEMENT OF THE HONORABLE JIM DeMINT, U.S. HOUSE OF REPRESENTATIVES, (SC-4)

Mr. DEMINT. Thank you, Mr. Chairman and Congressman Toomey. I appreciate the opportunity to review the details of this bill, and I particularly appreciate the Subcomittee's interest in the issue.

And I am here today to speak about House Resolution 1793, which we call the Truth in Employment Act. It is a bill I introduced last summer to stem the harm being done now to companies by salting, which you have explained. It is a union tactic that is causing material economic damage to small businesses every day in this country.

At the outset, if I could add to some of the definition, Mr. Chairman, that you mentioned about the definition of salting. While union supporters and the National Labor Review Board have defined the term as placing of union members on non-union job sites for the purpose of organizing, it has been widely documented that the true motivation of many salts is simply to increase the cost of doing business for non-union contractors, regardless of the wishes of the employer's bonafide employees.

Salting is much more than someone seeking employment for the purpose of union organizing. It is repeated attempts to interfere with business operations, harass employees, and cause economic harm through illegal actions and frivolous legal complaints against employers.

Union organizers who fail to convince employees to organize will use salting to shut down non-union companies, often going to extreme lengths, including preventing deliveries to job sites and destroying building materials.

In my own state of South Carolina, salting has resulted in the loss of hundreds of jobs. In Sumter, South Carolina, Yuasa Exide battery plant was targeted by the IUE CWA union. Union salts infiltrated the plant, and when employees there did not unionize, the union retaliated by sabotaging product, causing work slow-downs, making verbal threats and threatening phone calls, and putting nails in people's tires.

Union leaders threatened to shut down the plant, and that is exactly what they did. Six hundred and fifty people were laid off because the plant could not afford the increased costs of doing business resulting from the salting.

This plant, which was the first tenant in Sumter's industrial park, had been there since 1965, and provided high-tech, good-pay-

ing jobs in a rural area, was forced to close its doors just because of salting.

The impacts of salting are felt by many. Companies see increased costs from having to defend themselves against labor relations complaints, as well as lost hours of productivity having to fight these charges.

Consumers are impacted by salting when they experience increased costs, reduced competition, and fewer new jobs being created.

Federal Agencies spend untold sums to investigate claims that are later found to be without merit, forcing taxpayers to effectively subsidize union activity.

To put it bluntly, salting is a job-killer. At a time when we are working in Congress to enact policies which will spur job growth and ensure future economic prosperity, salting abuses are standing directly in the way of these goals. We can no longer allow American jobs to suffer at the hands of Washington labor bosses.

To prevent salting abuses from causing more harm to employers, I have introduced the Truth in Employment Act, along with Representatives Cass Ballenger and John Carter. This legislation amends Section 8(a) of the National Labor Relations Act, to make clear that an employer is not required to hire any person who seeks a job in order to promote interests unrelated to those of the employer.

This bill in no way infringes upon any rights or protections otherwise accorded employees under the NLRA. Employees will continue to enjoy their right to organize. The bill merely seeks to alleviate the legal pressures imposed upon employers to hire individuals whose overriding purpose for seeking the job is to disrupt the employer's workplace, or otherwise inflict economic harm designed to put the employer out of business.

Following my testimony you will hear from businesspeople who are on the front lines of the salting debate, and live with the effects of it every day. And I applaud them for coming here today, in spite of potential pressure not to do so.

Mr. Chairman, again I thank you for allowing me to testify. I would like to submit one testimony from past hearings. It is serial number 10572. That was the Committee on Education in Workforce, a testimony by Mr. Cook, a former union salt, of how he was trained, what his purposes were, so that we make it particularly clear that this is not a benign problem. It is a serious problem in American workplaces that we need to shut off here at the federal level.

So without objection, I would appreciate——

Chairman AKIN. Without objection.

Mr. DEMINT[CONTINUING]Thank you, sir. And thank you for the opportunity to testify. And I would be glad to answer any questions that you have.

[Representative DeMint's statement may be found in the appendix.]

Chairman AKIN. Well, let me start to try to understand a little bit the nature of how your bill works. You said that the essence of the bill is that an employer doesn't have to hire somebody who has some interest totally separate from the interest of the em-

ployer. In other words, the employee is working for the union, as opposed to for the company that he is being paid to work for.

How would that be enforced? And isn't that kind of a matter of judgment as to what somebody's priorities are? I mean, practically, is there a way to enforce it, I guess is what I am asking.

Mr. DEMINT. It should be our goal to enforce it. And I think not only should employers have the right to decline hiring someone who we know to be a union salt, but it would also allow them, if found that they came to work under false pretenses, would allow them to terminate that employee without having to deal with lawsuits from the National Labor Review Board.

Chairman AKIN. So this would give them two outs, then. First of all, if the guy comes in and says "I am a salt," then they could choose not to hire the person, according to your legislation.

Mr. DEMINT. Exactly, or with a background check it is determined that the——

Chairman AKIN. Okay. Later somebody comes in under the radar and says "I just need a job," and then it turns out that they are a salt, then that would be a basis to terminate? Would that allow them to do that, then?

Mr. DEMINT[CONTINUING]That is my intent. And we might have some counsel here to indicate if there is any disagreement in that, but that is certainly the intent. If someone is found to be working under false pretenses, that they have not told the truth, as Congressman Toomey talked about, the whole purpose of employment is deceit, then the employer should have the right not to have that person working for them.

And that is really what we are talking about, is freedom of employers to hire people who are there to further the goals of that employer.

Chairman AKIN. That sounds straightforward. I guess it would be interesting to hear whether legally this is enforceable, whether the language is right, but I trust that it is.

I would ask my colleague, Congressman Toomey, do you have any questions about the legislation?

Mr. TOOMEY. Well, I do. And maybe Representative DeMint could answer this question.

Are salts typically, when they are working for a contractor, for instance, are they typically also being paid by a labor union?

Mr. DEMINT. That is my understanding. And I think we may find out more from some of the other witnesses. But that is generally, I think, as the Chairman said when he introduced it, that is often the case.

Mr. TOOMEY. So they are showing up for work. They are punching a clock, they are getting paid by that employer. But they are also getting paid by someone else.

Mr. DEMINT. Right.

Mr. TOOMEY. It only stands to reason that the someone else who is paying them wants something in return for having paid them. I mean, they are there for some other purpose.

Mr. DEMINT. Exactly. And for the employer to have to pay someone to disrupt their business, it should not be allowed.

Mr. TOOMEY. Right. Now, the way I read the summary of your bill, it says that an employer would not be required to hire a per-

son who seeks a job in order to promote interests unrelated to those of the employer.

Is it your intention that it be presumed that if you are on the payroll of someone other than the employer, that fact alone would be determinative evidence that you are there to support some other interest?

Mr. DEMINT. That would be my intent. And certainly that is clear.

Mr. TOOMEY. Under current law, is an employer allowed to ask on an application, for instance, when an applicant comes to look for a job, is it legal to ask whether or not you are currently, or if you got hired you would be paid by another entity, including a labor union?

Mr. DEMINT. I am not sure if it is or not. Someone else here maybe could answer that question. But certainly it is something we need to find out.

Mr. TOOMEY. It is something that, my understanding is that it can result in litigation, in any case.

Mr. DEMINT. Right. And that is the problem with a small employer. You will hear from them today. There is no way a 10-person company has the resources to deal with the National Labor Review Board, with the attorneys coming in from large labor unions. There is no way you can sustain that type of attack.

Mr. TOOMEY. Right.

Mr. DEMINT. In many cases, they have a lose/lose situation. If they try to fire someone who is working against them, they end up in litigation. If they keep those people there, they are likely to shut them down.

And so we have got the American employer, who we count on to create jobs and prosperity in this country, at a severe disadvantage to those who want to destroy them.

Mr. TOOMEY. Thank you very much.

Chairman AKIN. Thank you very much. I do not see any other people to ask questions, although there are some additional things that we may be able to develop from our second panel of witnesses.

I don't know what your schedule permits, Congressman, but if you would care to join us up here for a while, for the second panel, we would be honored to have you, if you would care to do that.

Mr. DEMINT. I may have to leave, but I will certainly make sure I get all the testimony today. So I will stay for a little while. But thank you so much.

Chairman AKIN. Thank you very much. Can we have now the second panel come forward?

I just want to, once again, formally thank all of you for taking the time, some of you to fly some considerable distance to join us today. And I understand that there is, I am sorry to say, some risk even associated with your coming.

Of course, that is the whole point of the hearing. But I do want to thank you. So I just want to first of all thank you all for coming.

I think what we will do in terms of the order of procedure is, I am going to allow each of you to make opening statements. I am just going to let everybody have their say. And then depending on the different Congressmen and their schedules, the ones that come and go, will be able to ask questions. I will ask questions, as well.

I think that is probably a straightforward way to proceed. I think we can move the meeting along fairly quickly that way.

So without further ado, I would like to introduce Clyde Jacob, III, from Jones Walker from New Orleans. I believe that, Clyde, you are a labor lawyer, and you have fought unions on behalf of victimized businesses. Is that overstating things, or is that pretty accurate?

Mr. JACOB. That is pretty accurate. Thank you.

Chairman AKIN. We are going to give you each five minutes for opening statement.

Also, if you would like to just submit something written for the record, you can do that. And then if you just want to talk off your notes and communicate whatever, however you want to handle the five minutes is up to you.

Clyde, would you proceed, please? Thank you.

STATEMENT OF CLYDE H. JACOB, III, JONES WALKER

Mr. JACOB. Thank you, sir. Mr. Chairman, members of the Subcomittee on Workforce Empowerment and Government Programs. I am pleased to be here, and thank you for your kind invitation.

I am here today to testify on behalf of the United States Chamber of Commerce, Washington, D.C. I serve on the Chamber's Labor Relations Committee, as well as its Subcomittee, focused on issues specific to the National Labor Relations Act.

I have written testimony that is much more extensive.

Chairman AKIN. Excuse me. Could you possibly bring the mike just a little bit closer? I think they would pick up better. Even a little more than that maybe. That wire is long enough you will be able to do it, I think.

Mr. JACOB. How is that?

Chairman AKIN. That is great. Thank you.

Mr. JACOB. You are welcome. I have written testimony that is much more extensive. I would like an opportunity just to summarize my written testimony, if I could.

I agree very much with the definition of salting that has been expressed so far in the hearing today. Unions often claim that salting is about the right of employees to organize. However, nothing could be further from the truth.

Salting is not about organizing for the employees. It is about organizing in spite of the employees. It is depriving employees of secret-ballot elections and information about the union. It is also about harassing, intimidating, and eliminating non-union employers.

Salting is particularly harsh on small business owners. I would like to tell you just one brief story of a case involving a Mr. Bill Tillinghast, the owner of Custom Fabrication, Inc., a small precision fabrication company in Kenner, Louisiana, a New Orleans suburb.

Bill is a welder by trade, and began his career in 1964 building Chrysler automobiles for the United Auto Workers Union. In 1974, with $600 in the bank, and wife, two children, a mortgage, and a lot of determination, Bill left his welding job to go after a piece of the American dream: to start a precision fabrication company.

He operated out of a garage for four years, until he had saved enough money to move into a small warehouse. By last year he had grown to 16 employees; he was planning to hire three more employees. So he did what every normal small business owner does looking to hire workers; he placed an ad in the paper. Bill never expected what would happen next.

On January 10, 2003, Sheet Metal Workers Local Union President, Local Number 11, applied for a welding position. Mr. Lopez's application clearly demonstrated his union affiliation. Even though he had no precision welding experience, he was still offered the opportunity to take a welding test, a requirement of all applicants.

Mr. Lopez took the test and passed one test, but refused to take the second test. His reply was, ''I don't care. I will sweep floors. All I want to do is organize this place.''

The foreman replied, ''If you do not want to take the test, you should leave,'' which he did.

Two days later another Sheet Metal Workers member came, and did the exact same thing: applied, was interviewed, and refused to take the test. Both men then filed charges with the National Labor Relations Board alleging discriminatory failure to hire because of union affiliation. They also said that the company—and this was never the case—said the company did not want to have anything to do with unions.

After three months of investigation, and approximately $10,000 in attorneys' fees to Custom Fabrication, not a small sum to a small business—I mean, we may scoff at $10,000, but for a small business that is a lot of money—the NLRB offered to settle if Bill would post a notice stating he would treat all union and non-union applicants equally. Bill was reluctant to do so, but with mounting costs, he did agree to do that.

The moral of the story is this. Bill Tillinghast worked his entire life to create a business he could be proud of, a business that would support his family and the families of his employees; the type of business that helped make this country great. And two individuals who had no intention of working were able to come into Bill's business, refuse to take the tests required for employment, and then file a charge with the NLRB alleging discrimination.

The union agents did not spend a cent for the NLRB's prosecution of their charge. Instead, the American people, including Bill Tillinghast and Custom Fabrication, Inc., were forced to foot the bill.

The intent of union salts is not to genuinely seek employment. In my estimation, we have to question whether it is appropriate for finding a violation of the NLRA for an employer for failing to hire an individual who is not genuinely seeking employment.

In this and in past Congresses, several measures have been introduced that would address this issue. And Representative DeMint is one that the Chamber fully supports.

Thank you for your opportunity to testify today. I would be happy to answer any questions that you might have.

[Mr. Jacob's statement may be found in the appendix.]

Chairman AKIN. Thank you very much, Mr. Jacob. And our next witness is Jason Krause, with Brubacher Excavating, Bowmansville, Pennsylvania. The company has had consistent salt-

ing from two different unions from 2001 through today. The majority of the suits have been dismissed by NLRB as frivolous. Their local unions will not quit, however, and they have been salted as recently as this past Wednesday.

Is that right, Mr. Krause?

Mr. KRAUSE. That is correct.

Chairman AKIN. Please proceed with your five-minute testimony.

STATEMENT OF JASON KRAUSE, BRUBACHER EXCAVATING

Mr. KRAUSE. First of all, I would like to say thank you for having me here. And I would like to summarize my statement, and ask that it be included in its entirety for the record, what I have passed on to you.

Chairman AKIN. Without objection.

Mr. KRAUSE. Once again, my name is Jason Krause, and I am the Human Resource Manager for Brubacher Excavating. It is a privately-owned company that has 300 men and women in Southeastern PA working there.

B.E.I. is a proud member of the Associated Builders and Contractors, a national trade association made up of construction and construction-related firms across the country, all of whom are bound by their common belief in the merit shop philosophy.

I am here today to share some of my experiences on salting abuse, to express to you the desperate need for legislation prohibiting this type of tactic.

Salting has become an instrument of economic destruction aimed at non-union companies. It has little to do with organizing.

A publication of the IBEW, one of salting's principal proponents, has described that salting's tactics are filled with infiltration, confrontation, litigation, disruption, and hopefully annihilation of a non-union construction company.

Brubacher Excavating and I have become all too familiar with this type of disruptive, intimidating, and damaging pressure tactic.

A little history. Between March and May of 2001, nine members of the Operating Engineers Local 542 tried salting BEI. Upon learning that we would not grant them employment, the union filed an unfair labor charge with the National Labor Relations Board.

We retained counsel. We made our defense known to the National Labor Relations Board, at which point the Operating Engineers withdrew their charge.

Earlier this year, and in the past 2003, a business agent from the laborer's union informed Brubacher Excavating we were infringing on their "union territory," and were taking money out of the pockets of union members by doing business in this area. He went on to make clear that if Brubacher Excavating does not choose to have a potential business relationship with them, they would have no other choice but to launch a union campaign against our company.

Soon after that conversation, a year-long campaign of union harassment and intimidation was initiated by the Laborers Union and the Operating Engineers. We have endured everything from mass picketing, job shutdowns, picketing of our own open house for our families, friends, and employees. Meetings were set up with our customers to try to destroy relationships, long-term relationships with our customers.

It all became clear to us that we were victims of an unprovoked union campaign to smear our company's image.

From March through June of 2003, no less than 17 applications for employment were filed by union salts. Some applications were immediately dismissed by BEI because they were filed incorrectly, and contained false information. Other applicants were disqualified for inconsistencies regarding wage and other employment history, past employment history, which were later identified.

Over the course of the year the Operating Engineers and the Laborers Union made frequent trips to our office with the sole intent to harass our company. In total, 11 organizers were involved in filing unfair labor charges. The charges were so clearly based off of a frivolous nature, all but two of those charges were dismissed.

B.E.I., along with ABC, firmly believes in laws designed to protect employees. However, these laws are being manipulated by the labor unions in order to regain their diminishing market share.

Salting abuse has used corrosive government power to accomplish union goals, rather than competing fairly and ethically based upon merit.

In defending ourselves against false and frivolous charges, we have incurred thousands of dollars in legal fees, delays, and lost hours. While unions have the right to attempt to organize workers, open-shop companies and their employees have the right to refrain from supporting union activities, and be free from this type of harassment.

I would like to thank you for allowing me to speak.

[Mr. Krause's statement may be found in the appendix.]

Chairman AKIN. Thank you very much, Jason, for joining us today, and for your testimony. We will have some questions in a few minutes when we finish our other witnesses.

The next witness is Jonathan Newman. I understand, Mr. Newman, that you are a representative of AFL-CIO. Is that correct?

Mr. NEWMAN. No. I am here on behalf of the Building and Construction Trades Department of the AFL-CIO, which is a separate entity.

Chairman AKIN. Okay. The Building and Construction——

Mr. NEWMAN. Trades Department.

Chairman AKIN[CONTINUING]Okay. Now, does that mean that you work for the union, or for the government?

Mr. NEWMAN. I am a lawyer in private practice. Our firm represents labor unions.

Chairman AKIN. Oh, it does, okay. Then I didn't have as much information as I wanted. You have five minutes for your testimony, Mr. Newman. Thank you.

STATEMENT OF JONATHAN D. NEWMAN, BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO

Mr. NEWMAN. Thank you, Chairman Akin, ranking member Udall, for allowing me to present the views of the Building and Construction Trades Department on the issue before the Committee today.

My name is Jonathan Newman, and I am a partner in the law firm of Sherman, Dunn, Cohen, Lafer, and Yellig here in Washington, D.C. We serve proudly as the general counsel to the Build-

ing and Construction Trades Department, and have done so for many years.

The Building and Construction Trades Department is comprised of 15 national and international unions representing approximately one million hard-working men and women in the construction industry, and several million more outside of construction.

I ask that the more extensive written statement on behalf of the Building and Construction Trades Department's President, Edward C. Sullivan, be made a part of the record. And I ask, Mr. Chairman, that, like the statements of the other witnesses here, it be made available to the public on that table.

Chairman AKIN. Without objection.

Mr. NEWMAN. The Building and Construction Trades Department has witnessed several attempts over the years to do what this bill seeks to do. And that is, allow employers to discriminate against union organizers and supporters with impunity. Those bills which were introduced and considered in the 104th, 105th, 106th, and 107th Congresses were each defeated, and this bill should meet a similar fate in this final year of the 108th Congress.

The bottom line of our position is this. Salting is about organizing: organizing construction employers, organizing construction workers, period.

Construction unions use skilled workers as organizers, tell them to do the best work possible, and to organize only within the confines of the law. These organizers are often referred to as salts. Very often they are volunteer organizers. They agree to hire on with non-union contractors to perform a good day's work for a day's pay, and help unorganized workers gain better wages and benefits for their families.

These organizers engage in the type of activity that Congress, the United States Supreme Court, and the National Labor Relations Board have recognized as being both protected and within the central core purpose of the National Labor Relations Act.

Contractors do not, Mr. Chairman, and should not, as they often claim, lose control of their jobs or their businesses as a result of a salting campaign. A salt, like any other employee, is subject to the employer's direction; must do his or her work in a satisfactory manner; and must obey all lawful work rules.

What is really at stake here is whether employers should be allowed to discriminate against employees on the basis of their union membership and activity.

Let me address for a moment, if I may, a fallacy I have heard in connection with this bill. And that is the idea that it would not curtail legitimate rights that employees currently have under the National Labor Relations Act. That is flat-out wrong.

The United States Supreme Court has held unanimously, in a nine-to-zero decision, that union organizer salts are entitled to the protections of the National Labor Relations Act, and cannot be discriminated against. This bill would eviscerate those rights and allow employers to create blacklists of union organizers, effectively hanging a sign in every non-union shop saying "union supporters need not apply."

Also, most unions are small organizations. And most union officers are part-time union officials. This bill would allow employers

to discriminate against those officers, and against everyone who could be said to be furthering their responsibilities when they apply for employment.

For example, a union shop steward could be legally discriminated against when he or she seeks a promotion. With seeking that promotion, that shop steward may be deemed to be seeking employment "in furtherance of his union responsibilities."

Thus, under current law, the situation of a salt is no different from that of an employee who is already on the job, and who decides to support his or her union. Both are entitled to the protection of the NLRA.

Mr. Chairman, I understand that those who resist organizing the construction industry claim that unions seek to drive up employers' costs, or even run them out of business. There are two answers to that claim.

First, the goal of organizing in all industries is to eliminate unfair competition based on substandard wages and working conditions. If a non-union employer is paying substandard wages and is organized, it certainly may, after a collective bargaining agreement is negotiated, have to pay the higher wages and benefits in the union contract.

Second, salting may result in increased costs to employers in another way. Many non-union contractors gain an unfair competitive advantage by violating various laws. When these contractors save money by violating the wage and hour laws, or by failing to comply with the prevailing wage requirements, or by failing to comply with OSHA requirements designed to protect the health and safety of their employees, it is fair to expose them, and we make absolutely no apologies for doing so.

Those who violate worker protective laws victimize not only their employees, but the legitimate contractors, both the union and non-union, who abide by the law.

Finally, if I may, there is a claim that——

Chairman AKIN. You five minutes are up, but finish up. It is fine, go ahead.

Mr. NEWMAN[CONTINUING] May I have one more minute?

Chairman AKIN. Yes.

Mr. NEWMAN. Finally, there is a claim that unions file frivolous charges with the NLRB to cause employers to incur legal costs. That is simply not true, and is not borne out by any of the statistics kept by the NLRB.

In fact, as set forth in our written statement, the number of unfair labor practice charges filed against employers has actually decreased since the Supreme Court's Town and Country decision in 1995, and the percentage of charges that have been deemed meritorious by the NLRB has held constant for decades.

Thank you, Mr. Chairman.

[Mr. Newman's statement may be found in the appendix.]

Chairman AKIN. Thank you for your testimony. Next witness is going to be—maybe I will just take a moment to introduce Congressman Udall, who is the minority Chair of this Committee. And he is going to be making a statement following your five-minute testimonies.

And it is a pleasure to have you here, Tom, this morning.

Let's see. The next witness is going to be Mr. Leonard and Mrs. Carol Cloninger. They are Construction Electric, Inc., from Helena, Montana. I think you may have the award for traveling the farthest to get here, but I know you come from God's country up there anyway.

And you are, as I understand it, a literal mom-and-pop put out of business by costly salting induced by litigation. I think that was the case that you are going to make, or the story that you have to tell us, is that correct?

Mrs. CLONINGER. That is correct.

Chairman AKIN. If you would proceed, you have five minutes. Thank you.

STATEMENT OF CAROL CLONINGER, CONSTRUCTION ELECTRIC, INC.

Mrs. CLONINGER. Thank you. And I have a prepared testimony that I would like part of the record.

Chairman AKIN. Without objection.

Mrs. CLONINGER. My name is Carol Cloninger; this is my husband, Leonard. We are former officers of Construction Electric in Helena, Montana. We started this company in 1989 out of a pickup truck, to provide a living for our family.

When we evolved into a larger operation, employing nine electricians, we had a bookkeeper, office manager, and a shop complex in Helena.

In October of 1998, up until 2000, the International Brotherhood of Electrical Workers began targeting our company by filing frivolous complaints to the Montana Electrical Board, all of which were dismissed without merit.

In August of 2001, we dismissed two electricians from our company for unsatisfactory job performance. Both had been recently hired, and they were on probation. They were essentially on the payroll, and not working in a productive manner.

In late September of 2001, we ran an ad in the newspaper for an electrician, and began receiving job applications through the mail, through registered mail, from the local IBEW organizer, who had harassed us previously in the previous years.

At that time, we contacted a labor attorney in Missoula, Montana, and acted on his advice. We also received application from an organizer in Billings, from the IBEW. And Billings is 250 miles from the capitol city, he was interested in coming to work for us from that far away.

We received a total of five applications, two of those which were what they called overt salts, and three which were covert salts. And that is all lined out in the testimony that we submitted.

In November of 2001, we received notice from the NLRB that we had been brought up on alleged charges for certain unfair labor practices by three of those five applicants. We attended a preliminary deposition in Missoula, to determine if there were grounds for discrimination, and that was followed by a hearing in July of 2002. And in September of 2002, judgment was handed down in favor of the IBEW.

We received notification in March of 2003 of back wages owed to three of these individuals, for an amount of $42,000. And we were

ordered to offer them jobs to make them whole. I might add that there were long periods of time, when we had asked numerous times for this process to be sped up, and we were told by members of the National Board that there was a tremendous back load, and that they would get to our case hopefully in time. But it ended up costing us a large amount of money because of the delays.

In April of 2003, my husband and I discussed our options, and we decided to close the company's doors. We could not continue to do business in that manner and be profitable.

Let me back up. The NLRB confiscated our bank account and our accounts receivable in June of 2003, for a total amount of $32,000. Late in July of this last year, we agreed to settle with the NLRB for that amount of $32,000, and this was to avoid bankruptcy of our company, and also due to the threat that my husband could go to jail if he didn't comply.

We provided benefits, such as retirement and health insurance and dental insurance, to our employees. We had one electrician who had been a diabetic since he was 19 years old; had never been able to afford quality health insurance. He was able to get an insulin pump and all the supplies that he needed to be a productive worker and live a healthy life.

We had another electrician who had never had health insurance his whole life. He needed extensive dental work, and he also had a drug problem, which he was able to go into rehab with our insurance that we provided, as well as get his teeth fixed. He is now living in the Seattle area working as an electrician, and is doing well.

We produced two master electricians, and we had four apprentices that were able to get out into the community and are doing well.

This was a terrible loss for us. We were taught when we were growing up that we needed to be accountable, and that it was always best to tell the truth. We ask you to, as we share our story with you, we ask everybody here to consider their values, and to consider this bill in an effort, and in the beliefs of our country, that we do things for the right reasons, and that we be honest.

Thank you very much. And we are always open for questions, if you have any.

[Mrs. Cloninger's statement may be found in the appendix.]

Chairman AKIN. We will do the questions in a little while. Thank you, Carol, and then Leonard.

STATEMENT OF LEONARD CLONINGER, CONSTRUCTION ELECTRIC, INC.

Mr. CLONINGER. The only thing I would like to say is, everyone testifying here today is right on, except for the legal representation for the AFL. I feel like he hasn't been in the trenches, and he really doesn't know what it is like to be a small businessman.

That is all I would like to say.

Chairman AKIN. Thank you for your testimony. Our last witness is Mark Mix, President of National Right to Work, from Washington, D.C. You have five minutes, Mr. Mix.

STATEMENT OF MARK MIX, NATIONAL RIGHT TO WORK

Mr. MIX. Mr. Chairman, thank you. I find it difficult to speak after this story that we have heard from our two witnesses just now.

I am Mark Mix, President of the National Right to Work Committee. Mr. Chairman, thank you for the opportunity to be here. On behalf of the 2.2 million members of the National Right to Work Committee, we commend you and Congressman DeMint for shedding light on this issue. This is an important issue.

I want to approach the issue from a little different angle. I would ask that my statement be included in the record. I am going to deviate a little——

Chairman AKIN. Without objection.

Mr. MIX[CONTINUING]Bit and respond to what has been said here today.

We, the Right to Work Committee, are dedicated to the principle that every individual worker should have the right, but should not be compelled, to join or financially support a labor union.

We are talking about small businesses, and the devastation that this particular practice of salting wreaks on those people that own small businesses.

But there is an element, as well, that needs to be discussed and considered. And that is the element of the employees of these companies. These individual workers, in most cases, have decided, for whatever reason, not to join or organize a union in their workplace. And the only way that union officials can get a toehold in these places of business is to send someone in, who in many cases is paid to do so by the union.

The labor laws in this country protect an individual to exercise their rights, vis-a-vis unionization. Section 7, the preamble of the National Labor Relations Act, states very clearly that individual employees have these rights. And to discriminate against someone based on union membership or non-membership in a union is against the law. And people are prosecuted for that, and they should be.

The section 7 preamble of the National Labor Relations Act unfortunately also contains a provision that allows for compulsory unionism. And that is, individuals can be forced to pay dues to join a union, or lose their job.

In the cases that we have heard about with these small businesses, while the small businessmen and women are obviously devastated by this, what about the employees that work for these companies? They have and can exercise their rights to join unions or not to join unions, but they haven't. And now we allow, through the Supreme Court—the AFL-CIO is correct, unfortunately the Supreme Court has ruled on this witness. It is unbelievable to us that salting is currently sanctioned under the National Labor Relations Act.

As it stands today, salting is interpreted and enforced based on a flawed interpretation of section 8(a), we believe. Small business owners and employees are continually brought up on unfair labor charges for insisting that employees focus primarily on doing the job they are actually being paid to do.

To give you some real-life examples, and we have heard a couple of good ones here, I want to take the case of Randy Truckenbodt, who is the owner of a non-union equipment company out in Illinois, who had several dozen employees. His business was attacked. A union salt applied for the job and was given the job. Within months, using company information provided by the salt, union officials and agents began following Mr. Truckenbodt's employees as they delivered their products to clients' businesses.

They warned customers that they would face picketing and strikes unless they stopped buying and renting from Mr. Truckenbodt and his employees. Union members also picketed in front of Mr. Truckenbodt's offices 24 hours a day, seven days a week, for months.

This salting campaign cost this company over $600,000 in lost customers and legal fees.

In addition to the intimidation tactics, Mr. Truckenbodt's company was vandalized dozens of times during the so-called organizing drive. Vehicle tires were slashed, electrical cables were cut, truck windows were broken, all during this effort to force union control over his employees.

In 23 years prior to this organizing drive, there had never been a recorded incident of vandalism.

When the destruction was taking place, the union salts filed multiple false unfair labor practice charges against Mr. Truckenbodt's company, all of which were eventually dismissed.

The business survived the salting campaign, and he and his company employees are still able to provide for their families.

But I want to talk about another employer, Charlie Walz, who runs a masonry company in Nebraska. Charlie started out as a union man, but he figured he could provide better service at lower prices for customers by going out on his own, union-free.

Charlie wanted a piece of the American dream. And like many hard-working Americans, he started his own company to make that dream a reality.

Before long his company was flourishing, his clients were happy, and so were his small but growing army of employees. But his success came with a price. The bigger Charlie's company got, the more employees he had, the more union officials wanted a piece of the action.

So when Charlie's employees resisted an unwanted advance of the union organizers, the salting started. This means that his employees rejected union organizing, and the union had to hire someone to come in and organize the company.

Charlie's company was fined by the NLRB. He spent tens of thousands of dollars on legal proceedings. Yet videotaped evidence supplied by Charlie's lawyers showed that union salts had refused job applications that were offered to them by Charlie's daughter.

Charlie is still in business. He was able to survive. But many are not so lucky. When small businesses resist salting, unless they are subjected to potentially ruinous legal costs and fines, they acquiesce to union monopoly control.

The Truth in Employment Act is an important piece of legislation. It protects not only the rights of small businessmen and women to run their businesses, and to hire employees who have a

bonafide interest in working for that company, but it also protects those individual employees across the country who have decided, for whatever reason, not to join or associate with a union. This is important legislation, and we believe it needs to be supported, debated, and passed.

Thank you.

[Mr. Mix's statement may be found in the appendix.]

Chairman AKIN. I think you got the award for the best timing. You finished right when the little red light went on.

Thank you for your testimony, everybody, and I appreciate you all taking time to join us here today.

Next in order of business is going to be recognizing the minority leader of this Committee. And Mr. Udall has been working with us a number of years, has a great deal of respect in the Congress, and we are very eager to hear his opening comments, as well.

Tom.

Mr. UDALL. Thank you. Thank you very much, Mr. Chairman. And I apologize to the Chairman for missing Representative DeMint and two of the witnesses. But I am here now, and ready to participate. And I will try to just give a brief opening statement.

As the economy continues to struggle, we see the toll it is taking on many workers, as jobs are shipped overseas, wages are slashed, and benefits, such as health care and retirement, vanish.

The reality is that a need does exist for unions to protect and advocate for our nation's workers. It is just as important now as it was decades ago.

Unfortunately, while the need is great, we are seeing an overall decline in union membership. Not because of a lack of interest, but due to a lack of access.

While some employers today allow their workers to unionize, there are others that construct barriers and engage in covert campaigns to intimidate and dissuade workers from learning about the benefits of union membership. Therefore, one of the only ways for these non-union workers to find out about the rights and conditions they are entitled to is through the practice of salting.

Salting is about the empowerment and education of working people. It is a practice that trains union members to work for non-union firms in an attempt to gain a foothold and organize the work force from within. This concept is useful in industries such as construction, where workers are constantly moving from one job to the other, and one contractor to the other. It is the most effective way for union organizers to communicate with these workers, by hiring them on these projects, and then finding time to educate them on their rights.

Unfortunately, there is a great deal of misconception surrounding salting. Salting does not disrupt the workplace. These individuals are held to the highest standards of conduct, meaning they work as hard as they possibly can to contribute to the company's overall success. There is simply no evidence that salting hurts small businesses.

Many employers falsely believe that salting results in frivolous charges being filed by unions. However, this is not the case. Both large and small companies actually benefit from salting. Many

times it uncovers massive violations of workers' rights by employers attempting to gain unfair advantages.

While most employers truly want to do what is best for their employees, the reality is there are bad players trying to prohibit their workers from earning fair wages and unequal benefits. That is why unions are important, and salting is a vital tool.

Because a stigma persists in many areas, having a union card may mean getting a pink slip. And this cannot be tolerated.

I know Representative DeMint testified earlier on his bill, and he has got some serious challenges in his state. And I would like to work with him on those challenges facing textile workers. And I hope that we would be able to get strong protections for the workers in those jobs, and make sure that there aren't further job losses and turmoil in that particular industry.

However, HR 1793 affects the basic right of workers to form and join unions. Simply stated, this legislation allows an employer to refuse to hire, or fire workers if their primary purpose for seeking employment is to organize on behalf of a union. This undermines the intentions of the original National Labor Relations Act, which was enacted for the purpose of protecting the right of workers to form and join unions.

As recently as 1995, the U.S. Supreme Court ruled unanimously to uphold the practice of salting, as one of our witnesses, several witnesses have noted. HR 1793 tries to overturn the U.S. Supreme Court decision, and in my opinion would nullify the essential purpose of the National Labor Relations Act. We should not attempt to weaken processes like salting, which are an essential way for working families to access fair wages, health benefits, and workplace protections.

The National Labor Relations Act has been one of the most productive, most effective anti-poverty programs in our country's history, because it allows working people to engage in collective bargaining in order to elevate their standard of living.

This proposal is a step back from that commitment. We should be standing in support of working families, not pursuing initiatives that weaken their quality of life.

Thank you, Mr. Chairman. And I look forward to participating in the questioning process.

Chairman AKIN. Thank you. I had quite a few questions here. It will take a minute to try to see where to start.

The first thing is, Mr. Jacob, in that you are an attorney and I am not an attorney, it is my understanding that in general—I don't know if this is state law or federal law—that as a rule, it is an illegal thing to try to intentionally put anybody out of business. Is that true?

Mr. JACOB. That could be a matter of state law, it could be a matter of federal law. As far as putting a company out of business, you can be hit with various business torts. I would say for the most part it is a matter of tortious interference with business, which you would find mostly at the state level.

Chairman AKIN. That is mostly a state law? Because I think I remember there was some deal that I was involved in, some abortion-type situation. And somebody said, I remember an attorney said, you know, you are perfectly legal if you want to have this or-

ganization not do abortions. That is legal to have that as your objective. But it would be illegal to have your objection to say that you want to put someone out of business.

Mr. JACOB. Many states have a tort called tortious interference with business. And——

Chairman AKIN. That is what they were probably referring to, then. Okay. So if the objective of a union were to actually put somebody out of business, then that would be in violation of at least some state laws.

Mr. JACOB[CONTINUING]It could, but you would run into a preemption problem likely, under the National Labor Relations Act.

Chairman AKIN. In other words, it is okay to do it in that situation.

Mr. JACOB. It is a very fact-intensive type of question, as to whether a particular state law is preempted by the National Labor Relations Act.

Chairman AKIN. Thank you. Second question to whoever. Is it true that there is a large backlog of cases with the NLRB? Is that true? I think it was part of your experience, the Cloningers, that you said there was a big backlog?

Mrs. CLONINGER. That is what we were told from our attorney, when he tried multiple times to contact the compliance officer that was involved in our case. Every time he talked to the compliance officer, he would say, well, I have got 30 cases ahead, and I will get to this when I can.

Chairman AKIN. Which effectively ran the clock, and ran up your fees for back wages and everything else.

Mrs. CLONINGER. Yes, that is correct.

Chairman AKIN. So you were really put right out of business by that entire situation.

Mrs. CLONINGER. The delays. Had it been done in a timely manner, we could have probably paid the fine and maybe even had enough work lined up that we could have used these employees. And we would have, had we had the work. But you know, our company was in so much crisis, we just lost our productivity and had difficulty. The economy certainly was a factor in that. You know, it just became prohibitive for us to stay in business at that point.

Chairman AKIN. Mr. Mix, you made a comment, something about employees have the freedom not to be unionized.

I think that what you were saying seemed to be pretty much in contradiction with what Mr. Newman was saying. Mr. Newman's comment is, you know, we want to use this as a means to allow laborers to know that they could be unionized, or about certain rights that they may have legally, that the laborers have no other way of getting to know.

That seems to be kind of in conflict with what you were saying, which was they have got the freedom, if they don't want to be unionized, to be left alone.

Am I correct is seeing there is a complete difference of opinion on that point?

Mr. MIX. Well, I think there probably is a complete difference of opinion on that point.

I would say this. In 28 states that do not have right-to-work laws, workers can be compelled to accept the representation and

pay financial fees to a labor union as a condition of keeping their job.

What I meant to address, was the example, in the company that we are talking about here in Montana. It wasn't the employees that they had hired that were interested in organizing the union. As a matter of fact, I would guess, I don't know, but I would say these employees were happy with their situation, and they weren't intending to organize a union. And if any one of these employees who was currently on the payroll would have come to these employers and said, look, we are going to organize a union, if they would have fired that employee, that employee certainly had rights under the law, protected rights under the law. And it would have been illegal to fire that employee for trying to organize a union.

The fact is, the Cloninger employees didn't want the union. And the union had to bring somebody in under false pretenses to get that organizing drive started. And that is outrageous.

Chairman AKIN. Thank you. I guess I have got one other question. And that is, the whole salting thing is somewhat new to me. But it also seems strange to me. And this is maybe more of an answer than a question, but I would appreciate it if a couple of you want to respond.

And that is, in a way, as a Congressman, I am in a way sort of a small businessman, in that I have 14 or 16 employees that work for me, some in a district office, some working here in D.C. And when I hire people, I wouldn't expect them to have a job that conflicts with the job that I am hiring them to do for me.

If one of them wants to get a job after hours and works at a different time or something like that, like they want to get a job bussing tables or singing in some bar or something, that is okay with me, as long as it doesn't interfere with, you know.

So it seems like an odd idea to have the Supreme Court or some law saying that you have got somebody who is being paid—because when you are paid, you are working for two different, separate bosses. I mean, with all due respect to my good friend Tom over here, if a legislative assistant says, "Todd, I want to work for you as your LA, but I am also Tom's LA," I would say wait a minute, you know, which one are you going to work for?

This seems like a strange situation, where somebody is being paid by two different employers. And it seems like it creates naturally a divergence of loyalties.

I guess one thing that you said, Mr. Newman, was that very often the salts are volunteers. I heard other people say very often they are paid. Is it ever the case that salts are paid?

Mr. NEWMAN. Sure. But very often they are not paid.

Chairman AKIN. Well, let's talk about the cases where they are paid. Do you think that is appropriate, for somebody to be paid by two different people?

Mr. NEWMAN. Of course I do. Certainly.

Chairman AKIN. And you don't think that creates any sort of a tension in terms of loyalty?

Mr. NEWMAN. The idea that there is a tension in terms of loyalty is at odds with 65 years of labor relations in this country.

There are thousands, tens of thousands, of union shop stewards that work in unionized plants, that are paid by their unions. There

are thousands and thousands of part-time union officers that go into the hall on the weekend and do what they need to do for the union, but spend the time working for their employer and are loyal, good, hard-working employees. There is absolutely no conflict, I don't think, at all.

Salts are told and are instructed to follow their employer's directions, perform a very hard day's work, and show both the employers and the employees, the non-union employees, what union trades workers can do. They are the most highly skilled, highly trained, highly motivated workers in the world, and that is what they are there to demonstrate.

Chairman AKIN. That seems to be at odds with the other testimony we have heard.

I now would turn to the minority member, Mr. Udall.

Mr. UDALL. Thank you very much, Mr. Chairman.

Mr. Newman, some businesses have raised the issue that it is unethical to go to someone's business as a salt, to seek employment for the express purpose of trying to organize employees. Can you respond to those comments?

Mr. NEWMAN. Obviously, I don't think that that is unethical. I don't think it is unethical to exercise rights that are protected by the National Labor Relations Act, to exercise rights that we judge other countries' human rights records on.

What I do think is unethical is to discriminate against someone who applies just because they are a union member. What I do think is unethical is threatening employees that you will close down their business before you will ever recognize a union. What I do think is unethical is firing union organizers. What I do think is unethical is threatening to use physical violence against anyone that so much as dares organize. And what I do think is unethical is inferring, both here and elsewhere, that there are ulterior motives involved, and that people have been threatened.

I was accused of not being in the trenches. I have been in the trenches on these matters. I have represented employees that have been discharged for doing nothing else than putting on a union button or wearing a union tee-shirt.

So do I think it is unethical to organize? Absolutely not. In my view, I have seen many unethical practices on the other side.

Mr. UDALL. Mr. Newman, if a non-union contractor hires a union salt, what kinds of things does the salt do to promote union organization?

Mr. NEWMAN. First, he will see he does the best job that he can. Because, number one, he wouldn't want to give anyone a lawful excuse, which is if you are not doing the job that you are supposed to be doing, there is nothing in the law that prohibits that contractor from firing that organizer. And obviously we don't want that to happen, and we want to demonstrate to the contractor that if it signs a union contract, it is going to have access to highly trained, highly motivated, highly skilled employees. So number one, they are told to work hard.

Number two, they are told to engage in organizing activity only within the confines of the law. And that means, for the most part, during non-work time, and often in non-work areas, like the break room or a break trailer.

Mrs. CLONINGER. May I——.

Mr. UDALL. Mr. Newman, is the purpose of salting to force non-union contractors to spend money defending frivolous, unfair labor practice claims?

Mr. NEWMAN. Absolutely not. And I think if you look at, and if anyone did the research and opened the books, and looked at the statistics that the National Labor Relations Board is required to keep as a matter of law, you would find that there has been no increase in unfair labor practice charges. Nor has there been any decrease in the number of charges that the Board has deemed meritorious.

Mr. UDALL. And let me be more precise there. Do you know whether the number of unfair labor practice charges filed against employers has increased in recent years or not?

Mr. NEWMAN. Yes, I do know that. I actually spent a morning this week at the National Labor Relation Board's library, which is open to the public, and I encourage anybody to do the same.

They issue a report every year, an annual report, where they break down the number of unfair labor practices that have been charged. And just to put everything in context, unfair labor practice charges average anywhere between about 28,000 to 35,000 charges a year. A little less than a third of those are charges against unions. So about two-thirds are charges against employers.

The year before the Town and Country decision was issued, which everyone thinks was the impetus to this explosion in salting, you had about 34,000 unfair labor practice charges filed. Last year, I believe the number was about 27,000. It was an 18- to 20-percent decrease since the Town and Country decision.

Mr. UDALL. Mr. Newman, in your opinion as a lawyer, would HR 1793 overturn the U.S. Supreme Court decision in Town and Country Electric, and effectively nullify the essential purpose of the National Labor Relations Act?

Mr. NEWMAN. Yes.

Mr. UDALL. What would you say to those who argue that legislation such as HR 1793 is necessary, since it is too expensive and burdensome for employers to defend themselves from mere allegations that they may have violated the National Labor Relations Act?

Mr. NEWMAN. Again, you know, to put everything in context, I have been on both sides as an attorney, both sides of an unfair labor practice charge. I have represented charging parties, and I have responded to charges filed against labor unions.

The first thing that happens, when you are a charging party, you are the person that is filing the charge against the employer, and you file it with the National Labor Relations Board. The first thing that happens is, the Board does not go out and get in their National Labor Relations Board police car, and go to the employer's offices.

The first thing that happens is they contact the union, and they say, "You better give us evidence that you have, which essentially makes out a case of an unfair labor practice," before they will even approach an employer. And I say that because I have been on the other side of an unfair labor practice charge. I have represented

unions on frivolous charges and charges that have had more culpable merit.

And when the charge is completely frivolous, the work that is undertaken on that, that is, the person that has been charged, oftentimes is nothing more than a phone call to the National Labor Relations Board explaining the fact that the charge is frivolous, and that is the end of the matter.

So what I am getting at is, in order to even get through the door of the National Labor Relations Board with your charge, you better present, and you have to present, enough evidence to establish that you have more than a culpable claim.

Mr. UDALL. Thank you. Mr. Chairman, I see my time is exhausted.

Chairman AKIN. Thank you. Next I call on Congressman Toomey.

Mr. TOOMEY. Thank you, Chairman. Mr. Newman, you have made the point in your testimony and your response to a question that the idea of a divided loyalty is a phony one.

But yet on page seven of your testimony, you have a sentence here where you say the participants, and you are referring to the salts, are willing to work for non-union companies in order to promote the union's goal of organizing unorganized employees.

It seems to me you have put it very clearly. These people are taking this job, they are taking someone else's money—namely, the employer, the contractor in this case—while working to promote the goal of an organization that has a whole different set of agendas. And you don't see any conflict there.

Mr. NEWMAN. I don't. I mean, Representative Toomey, let's take an example of an employer that someone suspects is engaging in race discrimination.

Mr. TOOMEY. But that is not what we are talking about. We are talking about——

Mr. NEWMAN. Oh, but——.

Mr. TOOMEY[CONTINUING]No, but I am trying—let me, I have got a few other questions and limited time.

If someone came to work on my staff, and they were—I am a Republican—if they were on the payroll of the Democratic Congressional Campaign Committee as well, while they were working for me, should I be forced to hire and keep that person on my staff?

Mr. NEWMAN. Well, there is a huge assumption built into your question.

Mr. TOOMEY. But it is the question. Do you think I should be forced to hire that person? Or should I be allowed to fire that person solely on the grounds that they came to work for me while they were being paid by the Democratic Campaign Committee?

Mr. NEWMAN. Well, as far as I know, the National Labor Relations Act doesn't protect party status, so I think you would be safe in not hiring that person.

Mr. TOOMEY. Let me ask another question. Do you advocate that salts deceive the employers by not disclosing that they are, in fact, salts?

Mr. NEWMAN. It depends. And I can tell you why. First of all——

Mr. TOOMEY. So sometimes you do advocate that.

Mr. NEWMAN[CONTINUING]Well, I can tell you what happens in reality, in the trenches. And that is, if you write down on your ap-

plication, as folks did that applied to the gentleman on my left's company and the folks on my right's company, they are not hired. If you disclose that you are a union organizer, what happens is you are not hired.

And so oftentimes, that fact is not mentioned on an application. And there is a decision in the Seventh Circuit Court of Appeals by a very, very conservative Republican-appointed judge, Judge Posner, that said that is okay. Because whether you are a union organizer or not should be irrelevant to the question of whether you are hired. Because it is unlawful to discriminate against somebody that is a union organizer.

Mr. TOOMEY. So there are times, then, when you do advocate that that information be withheld. Which I think is inherently deceptive.

Mr. NEWMAN. If someone goes and applies to a contractor over and over, and has disclosed that they are a union organizer, and it happens to be that while they are hiring 20 or 30 people off the street, they have refused to hire the 50 folks that are better trained, better qualified but the only difference being that on their application they say union organizer, then yes. I think at the end of the day, in order to avoid being discriminated against, oftentimes you have to leave that off your application.

Mr. TOOMEY. We have got testimony that we heard today. There is a story about a Mr. Truckenbodt's company. And there is allegations that terrible things were done. In one case, part of this testimony says that a company, using information provided by the salt, sent agents that followed Mr. Truckenbodt's employees as they delivered their products to clients' businesses. And when they got there, they warned the customers that they would face picketing and strikes unless they stopped buying and renting from Mr. Truckenbodt. Do you advocate that kind of practice?

Mr. NEWMAN. No.

Mr. TOOMEY. You do not advocate it. And so I assume that you certainly do not advocate, and in fact would condemn, the vandalism that is alleged, the broken windows and the tires getting nails, and——

Mr. NEWMAN. Yes, of course.

Mr. TOOMEY[CONTINUING]Which we have heard significant testimony, though.

Mr. NEWMAN. Well, I can tell you there is, I can give you significant testimony. Representative DeMint this morning offered testimony from previous hearings. I would encourage everybody to go back and look at the previous hearings on this issue. And you will read testimony from union organizers who were beaten with pipes, who had suffered similar vandalism at the hands of non-union contractors.

So I don't advocate it on either side, Mr. Toomey.

Mr. TOOMEY. Do you acknowledge that it often happens with salted employees? Or do you dispute that? Do you have any statistics about the frequency of that?

Mr. NEWMAN. I would acknowledge that union organizers often suffer physical violence. I would absolutely deny adamantly that union organizers engage in physical violence.

Mr. TOOMEY. Mr. Mix, do you have any comment to make about that?

Mr. MIX. I think the facts speak differently about that.

If you look at the record, the testimony of the former IBEW organizer that Congressman DeMint submitted into the record, you will see clearly he states that he was trained not to organize workers, but to file unfair labor practice charges against the employer that had hired him.

So I would encourage you to go back and look at that record. There is lots there, I would agree.

Certainly there are troubles and disputes in the workplace. But I would suggest that asking these two about their experience is probably the most beneficial thing we can do. They are in business, on the front lines, and they are seeing this.

The theoretical arguments that we are hearing that the AFL-CIO do not endorse this are totally rejected in the testimony of Mr. Cook, as a trained union organizer specifically to salt a company. Specifically to salt a company. Not to organize it; he admits it in the record.

I think the Cloningers' experience and the practical reality of this practice doesn't match to the theoretical that we are hearing today.

Mr. TOOMEY. Thank you.

Mr. CLONINGER. Could I add something to that, please? Gentlemen——.

Chairman AKIN. I think Mr. Toomey would allow you to.

Mr. TOOMEY. Certainly.

Mr. CLONINGER. Gentlemen, I have been an electrician for 27 years. The first nine of those 27 I was a union electrician. And I chose to leave the union because I didn't like what I saw, because of things that were not fair, and very, very intimidating to myself.

I was on both sides of the fence. I was union, and then I became non-union.

We are clearly talking about a small business versus very large businesses, where unions do play a role in benefitting the employees. The point I would like to make is small business doesn't need another middle-management person interfering between us and our employees.

And that is what I would like to say.

Mr. TOOMEY. Thank you very much.

Chairman AKIN. Thank you. You know, this is one of the situations we run into sometimes in the political world, where you have just got totally completely opposite and diverging opinions on something.

You know, the testimony of Mr. Newman was that these salts are great workers. Now, is there anybody else, other than Mr. Newman, on the panel that wants to say that—did anybody have great workers that were salts?

Mrs. CLONINGER. I would like to comment on that. The two electricians that worked for us, that we did let go, in their probationary period, one electrician refused to go into a crawlspace when he was asked. Well, when you are doing electrical work, you have to get into a crawlspace to complete the task at hand.

The other electrician had, we were working on a motel. And this guy had a tool pouch at one end of the building. And he was wiring some boxes on the other end of the building. He would go to his tool pouch on one end of the area, go do the work with the tool, walk clear back over to the tool pouch and get a different tool, and walk clear back over to the box that he was working on.

Chairman AKIN. What you are saying is he was not only not a good employee, but he was an intentionally bad employee in that situation. That was your experience, Mr. Jacob?

Mr. JACOB. In my testimony, written testimony, I tell the story of two union members who applied. They were hired. They knew what the pay was. The moment that they started on the project, they immediately started protesting the pay, did not do one piece of work, then said "we're going on strike," then filed unfair labor practice——

Chairman AKIN. So the bottom line is they were not good workers.

Mr. JACOB[CONTINUING]No, they were not. Their purpose was to disrupt.

Chairman AKIN. Mr. Krause, were your salt workers good workers?

Mr. KRAUSE. Well, we kind of have a different scenario at our company that has taken place. We have never had the opportunity to hire salt workers.

And it is clear to me that I have a different view on this. And to put everybody's mind at ease, these people do identify themselves, at least at our company. We are a little bit bigger company; we have 300-plus employees. They do identify to us who they are. And there is no mistake about who they are the moment they come in the door.

Chairman AKIN. So you are a little bit bigger operation, then.

Mr. KRAUSE. Yes, we are a little bit bigger. From the moment they walk through the door it is very well known who they are. They have their hats, their shirts. They come in groups, six, seven employees at a time to fill out applications. They all know me by name. They know my family. They know my father, who was a longstanding union worker. Some of them worked with my father.

So they come to our company in a little bit different manner.

It strikes me odd how the gentleman aside of me says that they are the most highly trained and skilled people coming in, yet they fail to complete the application consistently, and make errors on their part all the time, to make it usually pretty easy to rule them out through the hiring process with just their applications.

We are currently getting ready to go to a hearing now to discuss two individuals that yet weren't dismissed; however, all 11 of them from this current 2003 year have been dismissed for failing to return phone calls, different wage history, stuff of that nature.

Chairman AKIN. So your experience was the same, that they weren't necessarily the most professional people.

Mr. KRAUSE. No. And they——.

Chairman AKIN. That is all I wanted to do on that particular question. What my point is, I am trying to point out just, it is really amazing, there is just really a difference between, you know, the theory and what seems to be going on out there in the workplace.

I think the thing that concerned me the most was when I heard that people were afraid to even testify here because of the rough tactics that have been going on, and that is what a number of you documented, that those things were happening, that seems to me so un-American.

Did you want to comment on that?

Mr. JACOB. Yes, sir. I told the story of two clients that we represented. There were about four others who would not let me tell their story, ones that have charges pending, ones that just do not want the kind of trouble that they have experienced with salting in the past.

Chairman AKIN. It seems, from the testimony that we are hearing, and from the people that don't even want to testify, that the salting practice is very expensive, overall. It is expensive to companies. It is expensive to our competitiveness as a nation, our ability to be competitive.

Mr. NEWMAN. Mr. Chairman, could I address that point, if I might?

Chairman AKIN. You have got about 30 seconds to, yes.

Mr. NEWMAN. To tell you how contractors can make the salting practice very inexpensive.

Chairman AKIN. Unionize, right?

Mr. NEWMAN. Excuse me?

Chairman AKIN. Just unionize, right?

Mr. NEWMAN. No, it is not violating the law. And the reason why contractors are hit with $40,000, $50,000 fines is because they violated the law. Because Administrative Law Judges, the National Labor Relations Board, Courts of Appeals who enforce those orders find that they have violated the Act.

Chairman AKIN. Well, it may be that that is part of the point of our hearing, even. I mean, as I see how it has worked out, and I hear the logic of what the Supreme Court is saying, it seems to me that you have got a complete conflict of interest when you have somebody being paid, you know, to do two different, separate things.

My time has run out. And I have to run things by the rules here.

Mr. Udall.

Mr. UDALL. Thank you, Mr. Chairman. Mr. Newman, you were asked by Representative Toomey about the divided loyalties issue, and I think you wanted to respond. Do you remember where you were in that?

Mr. NEWMAN. I think I responded. And that is simply that the idea that there is necessarily this unbridgeable conflict between a union member and an employer is just completely at odds with everything this country has stood for, and everything we judge other countries on, for centuries.

And that is, you can be a good union member and a good employee at the same time.

Mr. UDALL. Are there other issues that have been raised by witnesses here that you would like to respond to? Charges or allegations or something that you think have gone unanswered, that you would like to respond to?

Mr. NEWMAN. Well, I guess I would just say this, and repeat what I have already said.

First, you know, I am a small business owner. I am a partner in a very small firm, and I appreciate and support small businesses, as does the Building and Construction Trades Department and organized labor.

It is in no one's interest, on the labor side or management side, to drive anyone out of business. We know and we appreciate the fact that contractors are the people that supply our members with jobs. And that is not the purpose of salting, that is not what we are all about. We support small business, and we support the efforts in this Congress to continue to support small businesses in this country.

Mrs. CLONINGER. May I comment on that?

Mr. UDALL. Well, not on my time. Maybe the Chairman will give you some time here.

Mr. Newman, what would your response be to the argument that the Truth in Employment Act simply gives an employer a level of comfort that someone coming to work for them is truly motivated to be an employee?

Mr. NEWMAN. I would say that the Truth in Employment Act gives an employer a level of comfort that they can discriminate against people that exercise their rights under the National Labor Relations Act with impunity. That is what it does.

Mr. UDALL. Well, I have a little time. Go ahead.

Mrs. CLONINGER. I guess I would just like to comment on the fact that the union organizer who had targeted our company, it was reported back to us by other union electricians in the city of Helena that he would go around at his union meetings, and within the community, and say that his whole goal was to put Construction Electric out of business.

Mr. UDALL. Can you give us the name of that individual?

Mrs. CLONINGER. The union organizer?

Mr. UDALL. Yes, that you just said did that.

Mrs. CLONINGER. Yes. His name was Keith Allen.

Mr. UDALL. And, ma'am, all the incidents you are talking about ended up resulting in a finding that your company had broken the law, under the National Labor Relations Act, and you were fined for that, right?

Mrs. CLONINGER. That is correct.

Mr. UDALL. Sir, did the same thing happen to you?

Mr. KRAUSE. A similar situation occurred to us.

Mr. UDALL. First of all, was an investigation conducted by the National Labor Relations Act, and it was found that you were in violation of the law?

Mr. KRAUSE. No.

Mr. UDALL. No?

Mr. KRAUSE. We have not been found to be in violation with any of the laws relating to the NLRA.

Mr. UDALL. Was there a finding that there was something frivolous going on by anyone?

Mr. KRAUSE. Enough that the charge, nine of 11 charges were dismissed, yes.

Mr. UDALL. Mr. Mix, you mentioned this individual, Mr. Truckenbodt. Mr. Chairman, the individual isn't here, and we have been hearing stories bantered about him. I would like to submit

some questions, specific questions to you, to find out for the record, and you put in the information of what all the circumstances were.

Mr. MIX. I can do that for you, Congressman. Absolutely.

Mr. UDALL. And the gentleman that also talked about, I think it is only fair if we are going to talk about people that aren't here, that we get as full as possible a record about what actually happened in these circumstances. And I think we——

Mr. MIX. Great idea. Yes, great idea.

Mr. UDALL[CONTINUING]Thank you, Mr. Chairman.

Chairman AKIN. I think probably we have had a chance to let people get some testimony out.

What I was going to do is just make a brief closing statement, which is a little broader than the overall subject even of the salting.

And that is something that I have had a chance to run Committee hearings all over the country. And one of the things that we are very concerned about in America is a loss of jobs, and a loss of opportunities for our American citizens to find work.

And while the economy is coming back and numbers look good and everything, yet at the same time there is an erosion, particularly in the manufacturing. I personally came out of the steel background myself, and saw what happened when the steel industry just fell out, and all those jobs went overseas.

The position that I have now as a member now working for the government, and really working for the citizens of our country, is to take a look at things that increase the overall cost of doing business. Because a reason somebody moves jobs and plants overseas is money. It is as simple as that. It is money. It is not because they are anti-American, it is the money.

And so my concern is that anything that adds to our competitive disadvantage in this country is something that is a high concern to me. And today, in this Committee, I am concerned about the fact that we have seen, in spite of the testimony that in theory this is supposed to be a good practice, what we are seeing is businesses are being shut down. And in fact, from our experience, businesses are being intimidated from even appearing before this Committee, and that is a grave concern to me.

So that would be my closing comments. I recognize Mr. Udall.

Mr. UDALL. Thank you very much, Mr. Chairman. You and I both, I think, agree that we, as a country, are in a crisis situation in terms of jobs being lost overseas. And that part of it, as you have just said, has to do with the profit motive and being about money.

I mean, one of the things that we could do that would make a real difference is examine our tax code. Because right now taxpayers pay for these companies to move the jobs over.

We give them incentives. We actually encourage them to do it, through the tax code. And I think we ought to do a thorough examination, and say to companies, well, if you are going to do it, we are certainly not going to pay for it, and we are going to make it more difficult for you. Because we have lost far too many jobs in your state, in my state, and Representative DeMint's state I know, and in Representative Toomey's state of Pennsylvania, in these areas where there are good, high quality, high paying jobs. And I

would like to see us focus on that, and other Committees in the Congress focus on it. And I look forward to working with you.

Chairman AKIN. Thank you. And I think that makes good sense. I think all of us don't want to reward people for moving jobs overseas, and we don't want to create any institutions that do that.

I thank you all so much for coming in. I appreciate your testimony. And we will be adjourned.

[Whereupon, at 12:09 p.m., the Subcommittee meeting was adjourned.]

OPENING STATEMENT
26 FEBRUARY 2004

SUBCOMMITTEE CHAIRMAN W. TODD AKIN
SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT &
GOVERNMENT PROGRAMS

HEARING ON
UNION SALTING OF SMALL BUSINESS WORKSITES

Good morning. I would like to extend a warm welcome to those of you who have joined us today to testify before this Committee. I appreciate the time you've taken out of your busy schedules to help the Congress better understand some of the issues affecting small business owners and their employees. Small business employs more than half of the private-sector work force and accounts for as much as 75 percent of all the net new jobs. Given their important role in our economy, anything that adversely

affects small businesses should be of serious concern to the Congress and to all Americans.

The issue before us today bears the dubious honor of holding the second largest backlog of cases before the National Labor Relations Board. The act of "salting" first came to my attention last year when my staff met with several small businesses from my home State of Missouri. "Salting" is the act of deliberately inserting a union organizer, or "salt," into a non-union company. The "salt" applies for a position with the company, sometimes notifying the small business owner of his union status, and other times concealing his identity. The "salt" seeks employment by the company in order either to establish a wellspring of support for unionization or simply to disrupt the business and its employees. In most cases, the salt is a

member of a local union being paid by that union for his or her services.

A salt is often sent in after an honest, forthright attempt to organize has been rejected by the employees of a company. Employees often do not know that their new co-worker is a paid union organizer who is collecting a fee for "selling" or "re-selling" his unsuspecting fellow employees on the idea of unionizing.

When an employer, particularly a small business owner, is confronted by a salt, he or she is presented with a lose-lose situation. Hiring the applicant often leads to a disruption in the business. If the owner chooses not to hire the applicant, whose sole purpose is to organize or disrupt the business, the applicant and his union file charges of unfair hiring practices with the National Labor Relations Board. These charges often lead to a long, costly, litigation

process that becomes an enormous financial burden for the company. In more than one case, this process has driven the company out of business. It has been suggested by some that this is in fact the goal of union salting.

In preparing for today's hearing, my staff contacted a number of organizations seeking input on this issue. All of the organizations we contacted had heard from their respective members concerning the practice of salting. However, when asked to testify about their experiences, these small business owners declined to do so largely out of fear of reprisal. My staff heard story after story of small business owners across the country that feared for their safety if they came to testify before this Committee. These folks spoke of being run off the road, their loved ones being threatened and even receiving death threats. Organizing is

the right of all Americans, but threatening those who choose not to is unjust and, in the deepest sense, un-American.

In light of what my staff discovered about the tactics of some union organizers, I want to commend Mr. & Mrs. Cloninger for their willingness to come before this Committee. The Cloningers were the owners of an independent electrical contracting firm which fell prey to salting. I look forward to hearing your testimony.

This Committee is not just about taking testimony on a problem, but also about seeking solutions to that problem. My friend and colleague Congressman Jim DeMint of South Carolina has proposed legislation to address this issue. HR 1793, the "Truth in Employment Act of 2003," addresses the problem of "salting" in the workplace by removing any requirement that an employer hire any person who is not a bona fide employee applicant. I want to thank Congressman

DeMint for taking the time out of his busy schedule to join us today to testify to the need for and merits of his legislation.

America's unions hold a special and important place in the hearts of many Americans. However, the disruptive and anti-competitive tactics of union salting agents have no place in our society and should not be entitled to special protections under the National Labor Relations Act.

Again, I thank all of you who have made the time and, for some summoned the courage, to better inform this committee and the Congress on this issue of such serious importance to small business owners.

Testimony of the Honorable Jim DeMint
Before the U.S. House Committee on Small Business
Subcommittee on Workforce, Empowerment and Government Programs
on
H.R. 1793, the Truth in Employment Act

February 26, 2004

Good morning, Chairman Akin. Thank you for the opportunity to testify today. I appreciate the subcommittee's interest in this issue.

I am here to day to speak about HR 1793, the Truth in Employment Act, a bill I introduced last summer to stem the harm done to companies by salting, a union tactic that is causing material economic damage to small businesses everyday in this country.

At the outset, there is a basic disagreement over the definition of salting. While union supporters and the NLRB have defined the term as the "placing of union members on non-union job sites for the purpose of organizing," it has been widely documented that the true motivation of many salts is simply to increase the cost of doing business for non-union contractors, regardless of the wishes of the employer's bona fide employees.

Salting is much more than someone seeking employment for the purpose of union organizing. It is repeated attempts to interfere with business operations, harass employees and cause economic harm through illegal actions and frivolous legal complaints against employers. Union organizers who fail to convince employees to

organize will use salting to shut down non-union companies, often going to extreme lengths, including preventing deliveries to job sites and destroying building supplies.

In my own state of South Carolina, salting has resulted in the loss of hundreds of jobs. In Sumter, South Carolina, the Yuasa Exide battery plant was targeted by the IUE CWA union. Union "salts" infiltrated the plant, and when employees there did not unionize, the union retaliated by sabotaging product, causing work slow downs, making verbal threats and threatening phone calls and putting nails in people's tires. Union leaders threatened to shut down the plant and they did just that. 650 people were laid off because the Yuasa Exide plant could not afford the increased cost of business resulting from the salting. Yuasa Exide, which was the first tenant in Sumter's industrial park, had been there since 1965 and provided high-tech, good-paying jobs in a rural area, was forced to close its doors because of salting.

The impacts of salting are felt by many. Companies see increased costs from having to defend themselves against labor relations complaints as well as lost hours of productivity from having to fight these charges. Consumers are impacted by salting when they experience increased costs, reduced competition and fewer new jobs created. Federal agencies spend untold sums to investigate claims that are later found to be without merit, forcing taxpayers to effectively subsidize union activity.

To put it bluntly, salting is a job killer. At a time when we are working in Congress to enact policies which will spur job growth and ensure future economic prosperity, salting

abuses are standing directly in the way of these goals. We can no longer allow American jobs to suffer at the hands of Washington labor bosses.

To prevent salting abuses from causing more harm to employers, I have introduced the Truth in Employment Act, along with Representatives Cass Ballenger and John Carter. This legislation amends section 8(a) of the National Labor Relations Act (NLRA) to make clear that an employer is not required to hire any person who seeks a job in order to promote interests unrelated to those of the employer. This bill in no way infringes upon any rights or protections otherwise accorded employees under the NLRA. Employees will continue to enjoy their right to organize. The bill merely seeks to alleviate the legal pressures imposed upon employers to hire individuals whose overriding purpose for seeking the job is to disrupt the employer's workplace or otherwise inflict economic harm designed to put the employer out of business.

Following my testimony, you will hear from business people who are on the front lines of the salting debate and live with the effects of it everyday. I applaud them for coming here today to tell their stories.

Mr. Chairman, thank you for your interest in this issue and your work to raise awareness of the devastating effects of salting on small businesses. I would be happy to answer any questions at this time.

Statement of the U.S. Chamber of Commerce

ON: UNION SALTING OF SMALL BUSINESS WORKSITES

TO: HOUSE SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT AND GOVERNMENT PROGRAMS

BY: CLYDE H. JACOB, III

DATE: FEBRUARY 26, 2004

Testimony of Clyde H. Jacob, III

Partner, Jones Walker

On behalf of the

United States Chamber of Commerce

Before the

Subcommittee on Workforce, Empowerment and Government Programs

Of the

House Committee on Small Business

"Union Salting of Small Business Worksites"

February 26, 2004

10:30 A.M.

Mr. Chairman, members of the Subcommittee on Workforce, Empowerment and Government Programs, I am pleased and honored to be here today. Thank you for your kind invitation. My name is Clyde H. Jacob III, and I am an attorney with the Jones Walker firm, New Orleans, Louisiana. For almost 25 years, my practice has been devoted to labor and employment law. I have represented employers in hundreds of matters under the National Labor Relations Act (NLRA), including representation cases, unfair labor practice charges, collective bargaining negotiations, boycott cases, arbitrations, and strike cases. My clients have included Fortune 500 companies and small, local businesses, and my work in the labor law field has taken me around the country as well as overseas.

I am here today to testify on behalf of the United States Chamber of Commerce in Washington, D.C. I serve on the Chamber's Labor Relations Committee as well as its subcommittee focused on issues specific to the NLRA.

The subject matter of today's subcommittee hearing is the controversial tactic called "salting," which was developed over a decade ago by the American labor unions. Salting occurs when trained union officers, agents, organizers, or members (known as "salts") apply for and/or take jobs with a nonunion company or project in order to increase the employer's costs through a variety of tactics, including the filing of multiple frivolous charges and complaints against the

targeted employer with the National Labor Relations Board (NLRB), the Occupational Safety and Health Administration (OSHA), the Equal Employment Opportunity Commission (EEOC) and other federal, state and local agencies.

In many cases, the salting does not stop until the company is run out of business or agrees to union demands, which often include "card check" elections[1] and "neutrality" agreements[2], under which employees are denied the opportunity to privately cast their vote for or against the union (card check) and employer agrees not to provide employees with any damaging information about the organizing union or unionization in general (neutrality), or, in the construction industry, pre-hire agreements.[3]

Unions often claim that salting is about the *right of employees* to organize. However, nothing could be further from the truth. Salting is not about organizing for the employees, it is about organizing in spite of the employees. It is about depriving employees of secret ballot elections and information about the union. It is about harassing, intimidating and eliminating nonunion employers.

In fact, statistics show that salting campaigns are rarely successful at organizing employees and, in the end, do little other than cost employers and the economy a great deal of

---

[1] Under the NLRA, employees generally determine whether or not they want union representation through a secret ballot election held by the NLRB. To ensure a fair election free of employer and union coercion, the NLRB follows strict procedures. *See Information for Voters in NLRB Elections*, (detailing procedures) available at http://www.nlrb.gov/nlrb/shared_files/brochures/election.asp. An NLRB agent is present and oversees the entire voting process to make certain that neither the employer nor the union can determine how an individual employee votes. However, because in certain cases the union may clearly enjoy a majority of employee support, the law allows employers to waive the secret ballot election requirement and recognize a union that produces signed authorization cards from over 50% of the employees. Unfortunately, however, unions have abused this provision in the law by launching attacks on employers, which include salting, in an effort to pressure companies to agree to card elections even where it is not clear that a majority of the employees support the union. Some union organizers apparently find secret ballot elections an impediment to organizing, preferring instead "card check" elections, where employees are forced to cast their vote in front of the organizers and fellow employees who support unionization.

[2] The NLRA was designed "to ensure both to employers and labor organizations full freedom to express their views to employees on labor matters," S. Rep. No. 105, 80th Congress, 1st Sess., pp.23-25 (1947), as long as that expression does not contain "threat of reprisal or force or promise of benefit." 29 U.S.C. Section 158(c). The NLRB has said that "employees may select a 'good' labor organization, a 'bad' labor organization, or no labor organization, it being presupposed that employees will intelligently exercise their right to select their bargaining representative." *Alto Plastics Mfg. Corp.*, 136 NLRB 850, 851 (1962). In order for employees to make an intelligent choice regarding bargaining representatives, they must have information and an employer may be the only party who has the resources to find and convey information about a particular union's record of corruption, *see id.* at 851-52, racial discrimination, *see Handy Andy, Inc.*, 228 NLRB 447, 454-56 (1977), violence, *see Sonoco of Puerto Rico,* 210 NLRB 493, 494 (1974), bribery, *Mailing Services,* 293 NLRB 565, 565-66 (1989) or misrepresentation, *see NLRB v. Winchell Processing Co.*, 451 F.2d 306, 310 (9th Cir. 1971). Under a neutrality agreement, an employer agrees not to provide employees with any negative information about the union attempting to organize the employees or unionization in general.

[3] The NLRA allows an employer engaged primarily in the building and trade industry to enter into agreements with the union that require as a condition of employment that employees are union members, if doing so is not prohibited by state law, notwithstanding that there has been no determination as to whether the union enjoys support of the majority of employees. *See* 29 U.S.C. Section 158(f). Such an agreement, however, does not act as a bar to subsequent petitions for an election to determine majority status. *See Id.*

time and money. According to a survey by the Associated General Contractors (AGC) of America[4], fewer than 10% of the contractors reporting salting campaigns became signatories to a collective bargaining agreement and in only 25% of the cases did salts even file an election petition with the NLRB. Seventy percent, however, reported that salts had filed charges or complaints against their company under federal or state laws and that, on average, seven complaints were filed against each contractor costing the company an average of $8,500 per complaint in legal fees.

The abuse of union salting affects all businesses—from large publicly held corporations to small sole proprietorships. The negative effect on "mom and pop businesses" can be catastrophic, causing small business owners to incur significant legal fees and spend unnecessary time and effort defending legitimate employment decisions.

Once such recent case involved Bill Tillinghast, the owner of Custom Fabrication, Inc., a small precision fabrication company in Kenner, Louisiana, a New Orleans suburb. Mr. Tillinghast is a welder by trade, and began his career in 1964 building Chrysler automobiles as a member of the United Auto Workers Union. He joined Tanno Corporation in 1968 as a welding foreman, fabricating equipment necessary for offshore drilling. In 1974, with $600 in the bank, a wife, two children, a mortgage, and a whole lot of determination, Bill Tillinghast left Tanno to go after his piece of the American Dream—to start a precision fabrication company. Because of his limited resources, he operated out of his garage for four years until he had saved enough money to rent a small portion of a warehouse and hire a single employee.

The oil business was doing well, and so was Bill. By 1980, he had three employees and had outgrown his small place in the warehouse. Determined to move on to bigger and better things, Bill moved into a larger warehouse, and by 1984, employed 13 people. Unfortunately, that year disaster struck the offshore oil business, and Bill was forced to lay off all of his employees. But Bill did not give up hope. Over the next four months, he scoured the New Orleans area for businesses in need of precision fabrication. With a little luck and a whole lot of determination, Bill's search ended when he called upon a New Orleans mainstay—Lucky Dogs, Inc.

Lucky Dogs is a hot dog vendor which operates throughout the New Orleans French Quarter. The unique design of the "cart," in the shape of a hot dog, is what sets it apart from every other hot dog vendor in the world. In fact, its design was memorialized in the Pulitzer Prize winning book *Confederacy of Dunces* by John Kennedy Toole. This precision fabrication work for the hot dog carts saved Bill's company, Custom Fabrication, and its 13 employees.

Bill knew the Lucky Dogs work would not last forever, so he continued to explore new opportunities for Custom Fabrication. In 1986, he began building marine galleys and components for vessels, and has continued to do so ever since. Up until a year ago, business was good for Bill. He had grown to 16 employees and was planning to hire three more (one welder,

---

[4] Available at http://www.agc.org/Search/dis_search.cfm?ID=http%3A%2F%2Fwww%2Eagc%2Eorg%2Fcontent%2Fpublic%2FLegislative%5FInfo%2FPosition%5FPapers%2Fsalting%2Einc

one finisher/grinder, and one helper/trainee); so, he did what every other small business owner looking to hire does—he placed an ad in the newspaper. Bill never expected what would happen next.

On January 10, 2003, Sheet Metal Workers, Local Union No. 11 President, Jorge Lopez, applied for a welding position. According to the 2002 LM-2 financial report filed by the union with the U.S. Department of Labor, Mr. Lopez's compensation for his work for the union was over $54,000. There were four stages in the welder application process: (1) the applicant would fill out an application; (2) the application was reviewed by the foreman; (3) the foreman gave the applicant a tour of the shop and questioned his/her welding experience; and (4) the applicant was given a two-part welding test to measure his/her skills in specialized precision welding (the applicant would need to demonstrate skill welding for both stainless steel and aluminum). Mr. Lopez's application clearly demonstrated his union affiliation, and, as with all applicants, he was taken on the tour of the shop and questioned about his welding experience. Mr. Lopez had no precision welding experience, but was still offered the opportunity to take the welding tests. Mr. Lopez refused because he did not have his tools, and he was allowed to come back the next day to take the test.

Mr. Lopez returned the next day and did an average job on the stainless steel test, but refused to take the aluminum test. The foreman told him he would not be hired if he refused the test. Mr. Lopez responded, "I don't care, I will sweep the floors. All I want to do is organize this place." The foreman replied if you do not want to take the test you should leave. Mr. Lopez demanded to speak to Mr. Tillinghast, who was unavailable. After causing a scene, Mr. Lopez finally left and did not contact Custom Fabrication again.

Two days later another union member, Alan Feneca, applied for a welder position. His application also clearly demonstrated his union affiliation with the Sheet Metal Workers Union, and he was still interviewed and offered the welding test. Like Mr. Lopez, Mr. Feneca also declined the test, and was told that he would not be hired if he did not take the test. Mr. Feneca left and did not contact Custom Fabrication again.

Mr. Lopez and Mr. Feneca then filed a charge with Region 15 of the NLRB in New Orleans, alleging they were not offered employment because of their union affiliation. In May of 2003, the NLRB issued a charge against Custom Fabrication based on those complaints. Bill was dumbfounded, and did not understand how a charge could be issued when the two applicants refused the test required for employment. He did the only thing he could—he hired a lawyer.

Bill explained to the NLRB that both Mr. Feneca and Mr. Lopez were not hired as welders because both refused the welding test, and further explained that Mr. Feneca was not hired for either the finisher/grinder or helper/trainee positions because he did not apply for either position. Mr. Lopez, on the other hand, was not hired for either of the other positions because he was currently employed making more than twice the amount of both the finisher/grinder and helper/trainee positions.

After receiving Bill's explanation from the NLRB, Mr. Lopez modified his original story, and said the foreman told him Custom Fabrication did not want anything to do with union applicants. Bill explained that this new story made no sense because Mr. Lopez made his union affiliation known on the application, and he was still interviewed and allowed to take the welding test. In fact, he was allowed to come back the next day to take the test. Why would an employer go through the trouble and expense of interviewing and testing an applicant he had no intention of hiring?

After three months of investigation and approximately $10,000 in attorneys' fees to Custom Fabrication—not a small sum to a company this size—the NLRB offered to settle the charge if Bill was willing to post a notice stating he would treat all union and nonunion applicants equally. As you can probably determine from Bill's story, he is a dedicated and principled man, and he was very reluctant to accept the settlement because he felt by doing so he would be admitting that he had treated Mr. Lopez and Mr. Feneca unfairly to begin with. It was only after the realization that an unfair labor practice trial before an NLRB administrative law judge could cost him another $15,000 or more, depending on appeals, that Bill begrudgingly decided to accept the settlement.

The moral of the story is this: Bill Tillinghast worked his entire life to create a business he could be proud of, a business that would support his family and the families of his employees—the type of business that helped make this country the place it is today. And two individuals, who had no intention of working, were able to come into Bill's business, refuse to take the tests required for employment, and then file a charge with the NLRB alleging discrimination. The result of the unfounded charges was that Bill Tillinghast, a small business owner, had to spend $10,000 to defend himself, and was forced to either settle or incur significant additional legal costs. The union agents, on the other hand, did not spend a cent for the NLRB's prosecution of their charge. Instead, the American people, including Bill Tillinghast and Custom Fabrication, Inc., were forced to foot the bill.

The Custom Fabrication case is only one of a number of salting cases my firm has handled. In another case, two electricians, who were members of the International Brotherhood of Electrical Workers (IBEW) Union, used a different, more aggressive approach. They applied for work on a construction project and were hired; however, upon showing up for the job, they refused to begin work, protesting the pay rate they had been informed of at the time of hire. They never performed any work, went on strike, and filed unfair labor practice charges asserting they were fired for protected activity under the NLRA. During the ensuing investigation, the company discovered that the two union members had used this same tactic on multiple occasions, filing similar unfair labor practice charges against successive employers. The employer contended that the charges should be dismissed because of this clear abuse of process and due to the lack of credibility of the allegations. The Regional Office of the NLRB, however, would not dismiss the case. Faced with the choice of settlement or a costly, time consuming trial, the employer chose settlement.

In my view, salting works a terrible waste of time and resources not only on our country's economy but also on our government agencies.

The NLRA was enacted to protect the rights of bona fide employees to engage in concerted activity for their mutual aid and protection—not to facilitate the disruption of employers whose employees have voluntarily chosen to work on a union-free basis.

In *Lechmere, Inc. v. NLRB*, 502 US 538 (1992), the U.S. Supreme Court held that outside union representatives can be denied access to an employer's workplace. The Court reaffirmed that Section 7 of the NLRA was intended to protect the rights of bona fide employees, not outside union organizers.

In a later decision, *NLRB v. Town and Country Electric, Inc.*, 516 U.S. 85 (1995) the Supreme Court found that NLRB's determination that paid union organizers fall within the specific statutory definition of "employees" set forth in Section 2(2) of the NLRA when they apply for employment with a company was lawful. The NLRB has interpreted this holding to mean that employers who do not hire paid union organizers (salts) may, in certain circumstances, violate the NLRA. *See Town and Country Electric, Inc. v. NLRB,* 106 F.3d 816 (8th Cir. 1997).

The AFL-CIO, through its Building and Construction Trades Department, and the IBEW has stated that salting is a legitimate organizing tool that provides access to employees. This would be true if the current union salting tactic occurred in accordance with our societal and legal norms for applying for work and subsequent employment. Unfortunately, in practice over the last decade, salting does not occur in such fashion. Today's salting typically involves union agents or members applying at an employer en masse with a challenging and defiant attitude. Politeness and cooperation during the application process are minimal. Quite often a video camera is employed by the salts or an audio recorder. Hats and t-shirts with the union insignia are prominently displayed and repeated comments are made that the principal purpose for applying is to organize the company's employees. If not hired, regardless of the reason, all of the salts file unfair labor practice charges with the NLRB. In the event a salt is hired, the salt's primary efforts are not directed towards working in a timely and quality way like the other employees; instead, the salt focuses on continual solicitation and harassment of the nonunion employees at the company. This often occurs at all times throughout the work day, when employees should be working. Disruptions of the workplace, secretly creating safety issues, and even sabotage have occurred at companies undergoing union salting. The current union salting campaign is a perversion of the norms we recognize in our society for applying for work and for working once employed.

The labor unions that employ the salting tactic contend that a company faced with unlawful or possibly unlawful activity can discipline the worker, file a complaint with the NLRB, or notify law enforcement authorities. Experience has shown that an employer who responds by failing to hire, by discipline or by dismissal, will be faced with unfair labor practice charges filed with the NLRB and the expense of defending these charges, regardless of the legitimacy of its actions. Under the Board's procedures, if there is a credibility issue during the investigatory stage of a charge, that issue is not resolved by the investigator, but instead is set for a trial before an administrative law judge. So, even an employer who is attempting to legitimately respond to employee workplace wrongdoing can be faced with not only the cost of

an investigation, but also the cost of a trial, an appeal to the NLRB, and an appeal to a United States Circuit Court of Appeal.

The motive of union salts is not to genuinely seek employment. In my estimation, we have to question whether it is appropriate for finding a violation of the NLRA and imposing remedial obligations on an employer for failing to hire an individual who is not genuinely seeking employment. The *Town and Country* decision by the Supreme Court focused upon the definition of an employee under the NLRA, finding that a worker can be a company "employee" even if at the same time a union pays the worker to help the union organize the company. The broader issue is whether the abusive, disruptive, and harmful actions that characterize the current salting campaign by organized labor should be permitted to continue. The Chamber feels that they should not.

In this and in past Congresses, several measures have been introduced that would, if enacted, to one degree or another, address the salting problem. For example, Representative Jim DeMint, a member of this subcommittee and Vice Chair of the Subcommittee on Employer-Employee Relations of the Committee on Education and the Workforce, has introduced H.R. 1793, the Truth in Employment Act of 2003. The bill would amend the NLRA to make clear that an employer is not required to hire any person who seeks employment in furtherance of other employment or agency status. Also, Representative Norwood, Chairman of the Subcommittee on Workforce Protections of the Committee on Education and the Workforce, has introduced H.R. 2731, the Occupational Safety and Health Small Employer Access to Justice Act of 2003, which would make it easier for small employers to recover attorneys' fees if the employer successfully defends against a citation brought by OSHA. The bill would give OSHA greater pause in prosecuting what are clearly frivolous claims brought by salts. Last Congress, Representative Norwood introduced H.R. 4636, the Workers' Bill of Rights, which would require secret ballot voting for all union elections, thus prohibiting "card check" elections and eliminating the primary goal of salts in some cases.

Mr. Chairman and members of this subcommittee, we urge you to work with others in Congress to further explore the degree to which these measures may be appropriate for addressing the problem of salting.

Thank you for the opportunity to testify today and I would be happy to answer any questions that you might have.

Statement of Associated Builders and Contractors

Testimony of Jason Krause

Manager of Human Resources for Brubacher Excavating Inc.

On Behalf of

Associated Builders and Contractors

Before the House Committee on Small Business

Subcommittee on Workforce, Empowerment and Government Programs

Hearing on

Union Salting of Small Businesses

February 26, 2004

SPEAKING FOR THE MERIT SHOP

4250 North Fairfax Drive, 9th Floor
Arlington, VA 22203
703.812.2000 · www.abc.org

Good morning Chairman Aiken, Ranking Member Udall, and members of the Subcommittee on Workforce, Empowerment and Government Programs. I am extremely grateful for the opportunity to testify before you today on this issue of great importance to my company. My name is Jason Krause and I am the Human Resources Manager for Brubacher Excavating Incorporated (BEI), a privately owned construction firm employing over 300 men and women in southeastern Pennsylvania. Brubacher Excavating is a proud member of the Associated Builders and Contractors, a national trade association made up of construction and construction-related firms across the country, all of whom are bound by their common belief in the merit-shop philosophy.

I am here today to share with you our firm's experience with salting abuse and express to you the desperate need for legislation prohibiting this nefarious union pressure tactic. Salting is the practice of intentionally placing trained union professional organizers on non-union jobsites to harass or disrupt company operations, apply pressure, increase operating and legal costs, and ultimately put a company out of business. The objectives of the agents most often culminate in the filing of many unfair labor practice claims with the National Labor Relations Board (NLRB).

However, salting is not merely an organizing tool. It has become an instrument of economic destruction aimed at non-union companies that has little to do with organizing. A publication of the International Brotherhood of Electrical Workers, one of salting's principal proponents, has described that union's salting tactics as a process of "infiltration, confrontation, litigation, disruption, and hopefully annihilation of all non-union contractors." Unions send their agents into open shop workplaces under the guise of seeking employment when their true intentions are to deliberately increase costs to employers through workplace sabotage and the

filing of frivolous discrimination charges. Brubacher Excavating and I personally have become all too familiar with how disruptive, intimidating and damaging these pressure tactics can be.

Between March and May of 2001, nine members from Operating Engineers Local 542 tried to "salt" Brubacher Excavating. Upon learning that they would not be granted employment, the union filed an unfair labor practice charge with the National Labor Relations Board. We retained legal counsel and made our defense known to the National Labor Relations Board at which point the Operating Engineers withdrew their charge. Unfortunately, this was just the first incident in what became a seemingly endless campaign of bullying and torment at the hands of organized labor.

In early 2003, a business agent of the Laborers union informed Brubacher that we were infringing upon "union territory" and were taking money out of the pockets of the union members by doing business in the area. He went on to make clear that if Brubacher Excavating chose not to discuss a potential business relationship, which we ultimately did not based on our past experiences, he would have no other choice but to launch an attack campaign against our company. This blatant threat proved not to be an idle one.

Soon after this conversation, a year long campaign of union harassment and intimidation was initiated by the Laborers and the Operating Engineers. Groups of union members began regularly visiting our jobsites. They also engaged in what is known as "hand-billing," wherein union members positioned themselves outside our jobsites in order to waylay our employees with inflammatory, union organizing literature. Our employees were also forced to endure multiple incidents of picketing, the presence of a nearly 20 foot tall rat displayed outside our

place of business, and the forced shut down of a jobsite. Union officials also arranged meetings with BEI's customers in the hopes of damaging long standing business relationships. The unions were not above picketing BEI's annual "Open House," an event for families and friends of our employees. It became clear that we were the victims of a well-funded and completely unprovoked union campaign to smear our company's image and pressure us into succumbing to their self-serving demands.

From March through June of 2003, no less than 17 applications for employment with BEI were filed by union "salts." Several of these individuals filed multiple applications for employment at different points in time. Some applications were immediately dismissed by BEI because they were filed with false home addresses (even going so far as to use the Operating Engineers office as the home address in one case), while other applications were incomplete. Still other applicants were disqualified after we identified clear inconsistencies regarding wages and employment history. Over the course of the year, the Operating Engineers, the Laborers union and the Mid Atlantic Regional Organizing Coalition made frequent trips to our offices with the intent of harassing us, organizing our employees and increasing our cost of doing business.

As expected, once BEI made the decision to not hire any of the applicants, numerous unfair labor practice charges were subsequently filed by both the Laborers union and the Operating Engineers, claiming that BEI had discriminated against their applicants based on their union affiliation. In total, 11 union organizers were involved in filing these charges. The charges were so clearly of a baseless and frivolous nature, all but two have since been dismissed

without hearing. The NLRB has issued complaints on behalf of the two remaining organizers, concluding there was sufficient evidence to at least support the need for a hearing before an Administrative Law Judge. I am confident that BEI will be cleared of all charges in these remaining two cases.

BEI, along with the Associated Builders and Contractors, firmly believes in laws designed to protect employees; however, these laws are being manipulated by labor unions in order to regain their diminishing market-share. Salting abuse uses coercive governmental power to accomplish the unions' goals, rather than competing fairly and ethically based on merit. Additionally, I believe it is unfair for the government to compel an employer to subsidize a union organizer's disruptive behavior in the workplace; businesses like BEI should be able to hire people who truly want to work for that company.

Small businesses are not the only ones that suffer as a result of salting abuse. Since federal agencies pay all of the costs to investigate and prosecute these frivolous complaints filed by the union salts, the American taxpayer is funding the defense of unscrupulous, anti-competitive and often extortionist behavior. Moreover, investigating frivolous complaints wastes limited federal agency resources that could be better spent at the agency. Ultimately, it is the America taxpayer who loses, by having hard-earned tax dollars go to sustain the union's tactic of generating frivolous charges and lawsuits. The government should not be forced to use taxpayers' dollars to support a flawed system that allows tens of thousands of cases to be brought against employers that are later dismissed as having no merit.

The unions' efforts against merit shop competitors also result in an increase in both the cost of doing business and the cost to the consumer. As I stated earlier, these frivolous salting

charges have cost our company significant time, money and resources in defending ourselves against what amounts to baseless complaints. These complains have prevented us from hiring more employees, investing in better equipment, securing more work to grow our company, and providing additional jobs in the community.

In defending ourselves against false and frivolous charges, employers incur thousands of dollars in legal expenses, delays, and lost hours of productivity. Unions and their agents have argued that they have the right to organize and be hired to work on merit shop jobsites. While unions have the right to attempt to organize workers, open shop companies and their employees also have the right to refrain from supporting union activities and be free from unwarranted harassment.

Again, I thank you for the opportunity to testify before you today, and for your willingness to highlight this abusive practice. I am now happy to answer any questions the subcommittee may have. Thank you.

STATEMENT OF JONATHAN D. NEWMAN, ESQ.

ON BEHALF OF

EDWARD C. SULLIVAN, PRESIDENT

BUILDING AND CONSTRUCTION TRADES
DEPARTMENT, AFL-CIO

BEFORE THE SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT
AND GOVERNMENT PROGRAMS

OF THE COMMITTEE ON SMALL BUSINESS

UNITED STATES HOUSE OF REPRESENTATIVES

IN OPPOSITION TO

H.R. 1793

THE TRUTH IN EMPLOYMENT ACT OF 2003

FEBRUARY 26, 2004

STATEMENT OF JONATHAN D. NEWMAN, ESQ., ON BEHALF OF

EDWARD C. SULLIVAN, PRESIDENT
BUILDING AND CONSTRUCTION TRADES
DEPARTMENT, AFL-CIO

BEFORE THE SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT
AND GOVERNMENT PROGRAMS
OF THE COMMITTEE ON SMALL BUSINESS
UNITED STATES HOUSE OF REPRESENTATIVES
IN OPPOSITION TO H.R. 1793
THE TRUTH IN EMPLOYMENT ACT OF 2003

FEBRUARY 26, 2004

The Building and Construction Trades Department, AFL-CIO ("the BCTD") appreciates the opportunity to appear before this Subcommittee and to express its views on H.R. 1793, the Truth in Employment Act of 2003, and on organizing efforts often referred to as salting.

The BCTD is comprised of fifteen National and International unions representing one million employees in the construction industry. These affiliated unions represent in the aggregate several million employees. In order to maintain the status of salting as a legitimate form of protected activity, the BCTD submitted an *amicus curiae* brief to the National Labor Relations Board ("NLRB") in the companion cases of *Town & Country Electric* and *Sunland Construction* and has participated in many other "salting" cases.

The BCTD has also often testified in Congress on this very subject. Indeed, the bill before you, H.R. 1793, the Truth in Employment Act of 2003, is essentially identical to: (a) H.R. 2800, the Truth in Employment Act of 2001, considered by the 107th Congress; (b) H.R. 1441 and S. 337, the Truth in Employment Act of 1999, considered by the 106th Congress; (c) H.R. 758 and S. 328, the Truth in Employment Act of 1997, considered by the 105th Congress; (d) Title I of H.R. 3246 and S. 2085, the Fairness for Small Business and Employees Act of 1998, also considered by the 105th Congress; (e) S. 1981, the Truth in Employment Act, also considered by the 105th Congress; and (f) H.R. 3211 and S. 1925, the Truth in Employment Act of 1996, considered by the 104th Congress. The BCTD and representatives from its affiliated national and international unions have appeared before various Congressional Committees in connection with those bills.

H.R. 1793, like those efforts before, would deprive union organizers of the protection of the National Labor Relations Act and permit employers to engage in what has heretofore been deemed unlawful discrimination. And like those efforts before, H.R. 1793 is ill-conceived and is based on misconceptions about the purpose and nature of salting.

I.

The interest in bottom-up, employee-to-employee organizing among construction unions is a result of several factors, including the nature of the construction industry. In the construction industry, organizing has always been a difficult undertaking. Because jobs are short-lived and work is intermittent, it is nearly impossible for unions to engage in the type of organizing that takes place in other industries in which organizing campaigns frequently last several months and culminate in a representation election conducted by the National Labor Relations Board.

In 1959, Congress enacted Section 8(f) of the National Labor Relations Act, 29 U.S.C. §158(f), ("NLRA" or "Act"), permitting unions and employers in the construction industry to enter into prehire collective bargaining agreements (agreements entered into before the union can demonstrate that it represents a majority of the employer's employees, or even before any employees are hired), because Congress understood that "[r]epresentation elections in a large segment of the industry are not feasible to demonstrate . . . majority status due to the short periods of employment by specific employers." S. Rep. 187, 86th Cong. 1st Sess. at 55-56 (1959).

Several decisions in recent years have made the task of organizing construction workers and construction employers more difficult than it had been. In 1987, the NLRB issued its landmark decision in *John*

Deklewa & Sons, Inc. 282 NLRB 1375 (1987), *enf'd*, 843 F.2d 770 (3d Cir. 1988), holding that at the expiration of a Section 8(f) prehire agreement, a construction industry employer could terminate its bargaining relationship with a union, unless the union had won an NLRB representation election or obtained voluntary recognition from the employer based on a showing of support from a majority of its employees.

That task became far more difficult, however, after the Supreme Court decided *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). In *Lechmere*, the Court held that the NLRA did not provide non-employee union organizers any right of access to an employer's property and that an employer could invoke state trespass laws to exclude union organizers from its property. *Lechmere* thus permitted employers, including those in the construction industry, to deny non-employee union organizers access to the employees that they wanted to assist in organizing.

II.

The BCTD and its affiliated unions are committed to organizing unorganized employees in the construction industry. The right of employees to organize and join unions is the most fundamental right in the National Labor Relations Act. That right has been protected by federal law since 1935, when Congress passed the Wagner Act, declaring that commerce had been obstructed and burdened by "[t]he denial by

some employers of the right of employees to organize and the refusal of some employers to accept the procedure of collective bargaining." 29 U.S.C. §151.

Unions use numerous different methods to reach unorganized employees, to assist them in joining and supporting labor organizations, and to convince employers to recognize and bargain with the unions formed by those employees. Salting – the effort of union supporters and organizers to obtain employment with nonunion employers – is one such organizing method.

There is nothing new about salting. It has been used for many decades in several different industries. *E.g., Baltimore Steamship Packet Co.*, 120 NLRB 1521, 1533 (1958) (maritime industry); *Elias Bros. Big Boy Inc.*, 139 NLRB 1158, (1962) (restaurant); *Sears Roebuck & Co.*, 170 NLRB 533, 533, 535 n.3 (1968) (retail distribution center); *Dee Knitting Mills, Inc.*, 214 NLRB 1041, 1041 (1974) (textile industry); *Margaret Anzalone, Inc.*, 242 NLRB 879, 884-86 (1979) (clothing manufacturer); *Oak Apparel, Inc.*, 218 NLRB 701, 702, 714-07 (clothing manufacturer). In the construction industry, the practice goes back to the earliest days of the founding of construction unions in the latter part of the 19th century.

The increased use of salting in more recent years, particularly in the construction industry, is largely the product of changes in the law that limit other types of organizational activity. It is a valid and legitimate form of union organizing which, as one commentator has noted, "lie[s] at the core of NLRA protection." NOTE, ORGANIZING WORTH ITS SALT: THE PROTECTED STATUS OF UNION ORGANIZERS, 108 HARV. L. REV. 1341, 1347 (1995) (hereinafter "*Note*").

Some employers who have been the object of salting campaigns have complained vociferously – to the NLRB, to the courts, and to Congress – about what they contend is the unfairness of salting. At bottom, however, the essence of these employers' complaints is that the law prohibits them from discriminating against employees simply because the employees intend to participate in union organizing. There is nothing unfair in that prohibition, and it is consistent with the basic policies of the Act.

Those who participate in a salting program are union supporters and organizers who apply for jobs with nonunion contractors so that they can gain employment, perform exemplary work, and explain to unorganized employees the benefits of union organization. These organizers assist and support unorganized employees' efforts to obtain union recognition and a collective bargaining agreement from their

employer. The efforts to obtain recognition may include a representation election, a recognitional strike, an unfair labor practice strike (if the employer has committed an unfair labor practice), or other lawful tactics, all of which are traditional means of obtaining recognition that are protected by the Act. The participants are very often volunteers, who may be unemployed, and who are willing to work for nonunion companies in order to promote the union's goal of organizing unorganized employees.

Salts understand when they apply for work that they will be expected to fulfill the employer's legitimate employment expectations. Because union organizers do not want to give the nonunion contractors an excuse to discharge them, and because they need to earn the respect of their nonunion co-workers, they are encouraged to be exemplary employees. They are instructed to obey all of the employer's work rules and to work efficiently and skillfully.

If, as frequently happens, an employer responds to a salting campaign by committing unfair labor practices – often by refusing to hire union salts, or by firing those it learns are union salts – charges will be filed with the NLRB. We make no apology for filing these charges; employers do not have the right to restrain, coerce, or discriminate against employees who support union organizing, and employers who

commit those violations of the law should be held responsible for their conduct. That is not merely our view of how things ought to be; that is the law.

III.

The so-called issue of "divided loyalties" is, frankly, a phony one. The complaint of some employers that a salt should be denied the protections of the Act on the ground that he or she cannot be truly loyal to the employer, has been rejected both by a National Labor Relations Board whose members were appointed by Presidents Reagan and the first President Bush and by a ***unanimous*** Supreme Court.

The case that so held is, of course, the now-famous *Town & Country Electric* case. In that case, Town & Country, a very large, nonunion electrical contractor, acting through an employment agency, ran a newspaper advertisement announcing job opportunities for licensed electricians, and set up interviews in a hotel suite. Eleven members of the International Brotherhood of Electrical Workers showed up for the interviews. Two were paid union organizers; the other nine were unemployed members. After learning that these eleven applicants were union members, the company canceled the interviews. When one of the unemployed electricians, Malcolm Hansen, protested that he had an appointment to be interviewed, the company interviewed and hired him.

Once on the job, Hansen began soliciting support for the union during work breaks. Within a few days, the company fired him because of his organizational activities.

The company took the position before the NLRB that, regardless whether it is an unfair labor practice for an employer to fire an employee for engaging in organizing activities, there could be no violation here because neither the applicants nor Mr. Hansen were "employees" under the Act. The basis for this contention was the notion that receiving any sort of remuneration from the union rendered these members beholden to the union and, accordingly, incapable of possessing the degree of loyalty necessary to make them the employer's employees.

Reviewing the language of the Act, the legislative history, Supreme Court rulings and its own precedent, the National Labor Relations Board found consistent support for construing the term "employee" as "broadly cover[ing] those who work for another for hire," *Town & Country Electric, Inc.*, 309 NLRB 1250, 1254 (1992), and thus broad enough to encompass these union organizers. The Board found further support in common law agency principles, which provide that "[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other." *Id., citing Restatement (Second) of Agency* §226, pp. 498-500 (1957).

The Board then looked to the policies of the Act, to determine whether they were furthered by "protecting paid union organizers as 'employees.'" 309 NLRB at 1256. Starting with the proposition that "[t]he right to organize is at the core of the purpose for which the statue was enacted," the Board observed that "[n]o coherent policy considerations to the contrary have been advanced that do not, on analysis, resolve themselves into arguments that employers be permitted to discriminate based on an individual's presumed or avowed intention to join or assist a labor organization." *Id.* The Board found no conflict between affording these organizers the same protections enjoyed by other employees, and legitimate managerial rights. That is, the union organizer – like any other employee – is subject to the employer's direction and control, is responsible for performing assigned work, can be limited by lawful no-solicitation rules, and is generally subject to the same *nondiscriminatory* discipline. To the company's contention that paid organizers will, by their very nature, engage in conduct inimical to the employer's legitimate interests, the Board found that:

> "[t]he statute is founded on the belief that an employee may legitimately give allegiance to both a union and an employer. To the extent that may appear to give rise to a conflict, it is a conflict that was resolved by Congress long since in favor of the right of employees to organize." *Id.* at 1257.

That decision was appealed, and in 1995, the Supreme Court issued its decision in *National Labor Relations Board v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995). Justice Breyer, speaking for the ***unanimous*** Court, asked and answered the question before the Court as follows:

> Can a worker be a company's "employee," within the terms of the National Labor Relations Act ... if, at the same time, a union pays that worker to help the union organize the company? We agree with the National Labor Relations Board that the answer is "yes." *Id.* at 87.

The Supreme Court held that the Board's decision was consistent with the unmistakable language of the Act's broad definition of "employee" and with the policies of the Act, including "the right of employees to organize for mutual aid without employer interference . . . ." *Id.* at 91.

In holding that union organizers are employees entitled to the Act's protections, the unanimous Court thoroughly rejected the argument that paid union organizers were not protected by the Act because their so-called "divided loyalties" could lead them to quit at a moment's notice, try to harm the company, or even sabotage the company's products. As the Court held:

> If a paid union organizer might quit, leaving a company employer in a lurch, so too might an unpaid organizer, or a worker who has found a better job, or one whose family wants

> to move elsewhere. And if an overly zealous union organizer might hurt the company through unlawful acts, so might another unpaid zealot (who may know less about the law), or a dissatisfied worker (who may lack an outlet for his grievances). This does not mean they are not "employees." [A] company disturbed by legal but undesirable activity, such as quitting without notice, can offer its employees fixed-term contracts, rather than hiring them "at will" . . . or it can negotiate with its workers for a notice period.

516 U.S. at 96-97.

Thus, in *Town & Country*, a unanimous Supreme Court established that there is no distinction between a union organizer and an applicant/employee who is not an organizer. Both are "employees" under the Act, and both are entitled to the Act's protections. Accordingly, those that contend that H.R. 1793 would not curtail legitimate, protected rights that anyone has under the National Labor Relations Act, are simply wrong. The Supreme Court has held that salts have a protected right to be considered for hire and employed on a non-discriminatory basis. H.R. 1793 would eviscerate that right, legitimizing the creation of a blacklist of employees who need not apply for work with non-union construction contractors. Moreover, H.R. 1793 would also allow employers to fire those of its employees who dared engage in organizing under the direction of a labor union. These are massive changes, detrimental to working men and women in the United States,

and are completely at odds with the core purpose and structure of labor relations in this country.

IV.

Although salting is both a lawful and legitimate form of organizing, the most common response by construction industry employers to a salting campaign is the commission of unfair labor practices. Employers refuse to hire union organizers because they are union organizers and, if they are hired, discharge them because they engage in organizing. For example, in one case in which an employer discriminated against an employee in recall from layoff because of his "open support for the union," the Administrative Law Judge ("ALJ") concluded that the employer's "testimony about [the employee's] productivity [failures] was pure fabrication in an attempt to obviate the real [unlawful] reasons for not wanting [him] to work." *H.B. Zachry Co.*, 319 NLRB 967, 979 (1995), *enforced in relevant part*, 127 F.3d 1300 (11th Cir. 1997). The same employer had refused to offer overtime to an employee unless he stopped organizing; told the employee that he had been put on the employer's "hit list;" and subsequently fired the employee. 319 NLRB at 974.

Another case involved a salting program in which union organizers had been admonished by their union to "work as hard for a nonunion contractor as they would for a union contractor," to "try to make a

favorable impression," and in particular *not* to engage in "sabotage . . . lying, stealing cheating, obtaining information unlawfully . . . [or] mak[ing] any assumption that nonunion employees are less competent than union members." *Tualatin Electric*, 319 NLRB 1237, 1239 (1995), *enforced*, 84 F.3d 1202 (9th Cir. 1996). The employer responded to the salting campaign by "referring to [the union] as organized crime trying to put him out of business." *Id.* The owner told the superintendent "to eliminate wherever possible any personnel that were affiliated with the union;" told the employees that "as long as he owned the Company it would never be union;" and instituted a "no-moonlighting" policy for the specific purpose of eliminating those participating in the salting program. *Id.* The ALJ concluded that "Respondent's union animus is . . . pervasive and the nature of the unfair labor practices . . . egregious, striking at the very heart of the Act . . . Respondent['s] . . . conduct was directed against any applicant that had either worked for a unionized employer or that it suspected of having ever had a union connection." *Id.* at 1241.

There is no question that the employer conduct that I have just described is unlawful; the NLRA simply does not permit employers to exclude people from the workforce solely because they intend to promote unionization. It makes no difference whether the union supporter is acting with or without financial support from the union. Yet, the

volumes of NLRB decisions are filled with these cases, each telling a story of unlawful, often blatant, discrimination against union organizers. Nonunion construction employers, who find obeying the law either too burdensome or too threatening to their nonunion status, are promoting a fiction when they argue that working as union organizers converts these employees into an unprotected status and entitles the employers to discharge or refuse to hire them with impunity.

V.

Three years ago, the NLRB clarified its framework for analyzing salting cases in *FES*, 331 NLRB 9 (2000), a case in which the BCTD participated. The NLRB held that, in order to establish that an employer refused unlawfully to hire union organizers, the NLRB General Counsel must prove that: (1) the employer was hiring or had concrete plans to hire at the time of the alleged unlawful conduct; (2) the applicants had the experience or training relevant to the announced job requirements (or the employer has not adhered to such requirements, or that the requirements themselves are pretextual); and (3) that antiunion animus contributed to the decision not to hire the applicants. The employer may then prevail by demonstrating that it would not have hired the union organizers even if they had not been union supporters. Thus, nothing in

the law prohibits employers from refusing to hire union organizers, so long as the employer is not acting in a discriminatory manner.

The NLRB's framework in *FES* has been approved by the several Courts of Appeals that have considered it. *Fluor Daniel, Inc. v. NLRB*, 332 F.3d 961, 968 (6th Cir. 2003); *Operating Engineers Local 150 v. NLRB*, 325 F.3d 818, 828 (7th Cir. 2003); *Maisongale Electrical-Mechanical v. NLRB*, 323 F.3d 546, 553 (7th Cir. 2003); *Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1194 (D.C. Cir. 2003); and *NLRB v. FES*, 301 F.3d 83 (3d Cir. 2002).

Moreover, prohibiting employers from discriminating against union organizers simply because they are union organizers does not deprive employers of any greater degree of control over their work force or their work place than is inherent in the employee protections afforded by the Act. Nothing in the law limits an employer's right to promulgate and enforce legitimate work rules that are not a pretext for discrimination against union supporters. Nothing in the law precludes an employer from discharging an employee who is insubordinate or incompetent. Nor does the law prohibit an employer from refusing to hire an employee for a valid business-related reason; if, for example, the employer concludes, based on nondiscriminatory grounds, that the applicant cannot perform the job adequately. Although employees have a protected right to

communicate with each other on the subject of union organization, the law also permits an employer to promulgate valid "no solicitation" rules, which effectively prohibit organizing activity during work time. Additionally, the law permits the employer to exercise control over what work employees perform and how they perform it.

Contrary to the complaints of some nonunion construction employers, what is at stake here is not whether employers should be allowed to run their work places in accord with neutral rules designed to assure productivity and discipline. Rather, what is at stake is whether employers should be allowed to discriminate on the basis of suspected union membership and organizing activity. That is a point ignored by many of the critics of salting, principal among them Professor Emeritus Herbert R. Northrup of the Wharton School, University of Pennsylvania. *See* Northrup, "SALTING" THE CONTRACTORS' LABOR FORCE; CONSTRUCTION UNIONS ORGANIZING WITH NLRB ASSISTANCE, 14 J.LAB.RES. 469 (1993). Professor Northrup, relying on anecdotal evidence, surmises and conjecture, refuses to acknowledge the legitimacy of the organizing objective of salting. For example, Professor Northrup notes that salting allows a union to obtain information on the jobsite concerning possible violations of prevailing wage requirements, OSHA or environmental standards, *etc.* He calls the reporting of violations of these legal

requirements, which protect employees and the public, a "scam." That is a perverted view of the operation of law, however, as it seems to us that it is the *employer* who fails to pay legally-mandated wages, or who violates OSHA or environmental requirements, that has engaged in a scam. Indeed, employers who commit such violations victimize not only their employees, but also the legitimate contractors who comply with the law and must compete with those that do not.

Embedded in the NLRA is the premise that there is no conflict between the right of employees to engage in collective activity and their obligations to their employers. There is thus no conflict between a union organizer's duty to the nonunion employer by which he or she is employed, and that organizer's duty to the union. As the NLRB concluded in *Town & Country*,

> The Statute's premise is at war with the idea that loyalty to a union is incompatible with an employee's duty to the employer. The fact that paid union organizers intend to organize the employer's workforce if hired establishes neither their unwillingness nor their inability to perform quality services for the employer.
>
> . . . .
>
> The statute is founded on the belief that an employee may legitimately give allegiance to both a union and an employer. To the extent that may give rise to a conflict, it is a conflict that was resolved by Congress long since in favor or the right of employees to organize.

309 NLRB at 1257.

Acceding to the wishes of nonunion construction industry employers to treat union organizers differently in order to permit employers to screen them out would effectuate a fundamental change in the law, "undermin[ing] the purpose of the Act to protect workers' rights to organize." NOTE, 108 HARV.L.REV. AT 1342.

I want to emphasize again the only objective of salting is organizing. The Associated Builders and Contractors ("ABC") and some of its allies have claimed that salting is really about the filing of frivolous or harassing unfair labor practice charges against employers. That is simply not true. Charges are filed with the NLRB only in response to unlawful firings, refusals to hire, or other unlawful conduct by employers. Actually, the ABC has pointed out the fallacy of its own arguments. In the course of an ABC conference in 1995, entitled "Coping with COMET," ABC distributed a collection of papers. In those materials, this statement appeared: "Unions plan to wear down nonunion contractors by filing unfair labor practice charges with the NLRB *each time a contractor steps outside the National Labor Relations Act. (Emphasis added.)* That is absolutely correct; when a contractor violates the National Labor Relations Act in order to defeat organizing activities, charges will be filed – and should be filed. In short, if there exists a

"problem" of "too many" unfair labor practice charges being filed as a result of salting campaigns, that problem results from too many employers committing too many violations of the Act.

Some contractors have complained that union salts file frivolous unfair labor practice charges solely to make those contractors less competitive. Frequently these complaints come from contractors who have themselves been found to have violated the law. Those complaints are not only disingenuous, but they ignore the procedure under the NLRA which renders non-meritorious unfair labor practice charges against an employer of little or no value to a union. When charges are filed, the charging party must submit supporting evidence. If, but only if, such evidence is submitted, the NLRB General Counsel will conduct an informal investigation of the charge, during which employers generally do not retain or need legal counsel. Only if the NLRB General Counsel concludes that the charge has merit will an unfair labor practice compliant be issued and formal proceedings initiated.

Indeed, the National Labor Relations Board's own statistics demonstrate that any claim that salting has resulted in frivolous charges being filed with the NLRB is mistaken. For example, the National Labor Relations Board tracks the percentage of cases in which an NLRB regional office determines that a charge is meritorious and that more

formal proceedings are warranted. From 1980 to fiscal year 2003, this "merit factor" percentage has held relatively steady, fluctuating between 32% and 40%, including a 40% rating in the first two years after the *Town & Country* decision, and 38% last year. NLRB General Counsel Memorandum 04-01 at p. 4 (December 5, 2003) (available at www.nlrb.gov); SIXTY-SIXTH ANNUAL REPORT OF THE NLRB FOR THE FISCAL YEAR ENDED SEPT. 30, 2001 at p. 9, chart 5 (March 18, 2003). Thus, there is no truth to the claim that the NLRB has seen a growing number of frivolous unfair labor practice charges.

Moreover, the shear number of charges filed with the NLRB has not increased precipitously in the last several years. In fact, the number of charges filed has decreased since salting has allegedly become prevalent in the construction industry. For example, in FY 1994, the year before the Supreme Court issued its decision in *Town & Country Electric*, 34,782 unfair labor practice charges were filed with the NLRB, 26,058 of which were filed against employers. FIFTY-NINTH ANNUAL REPORT OF THE NLRB FOR THE FISCAL YEAR ENDED SEPT. 30, 1994 at p.6 (June 23, 1995). In FY 2001, 28,124 unfair labor charges were filed with the NLRB, 21,512 of which were filed against employers. SIXTY-SIXTH ANNUAL REPORT OF THE NLRB FOR THE FISCAL YEAR ENDED SEPT. 30, 2001 at p. 6-7 (March 18, 2003). Thus, in the six years following the *Town & Country*

decision, the overall number of unfair labor practice charges filed has decreased 20% and the number filed against employers has decreased 18%. Accordingly, the assertion that salts are abusing employers and the NLRB process by filing frivolous unfair labor practice charges is completely false.

VI.

In conclusion, the Supreme Court's unanimous *Town & Country* decision is a wholly accurate reading of both the National Labor Relations Act and the policies underlying it. There can be no legitimate debate about whether the right to organize is a core value of the Act. Nor can it fairly be argued that there is a lesser right to organize in the construction industry. Yet, this bill would foreclose effective organizing in the construction industry.

For the reasons we have shown, organizing in this industry is more difficult than it is in other industries. It is because of those difficulties, and for the reasons set forth above, that salting as a means of organizing in this industry has grown in recent years. For the reasons articulated by both the NLRB and the Supreme Court, that conduct is – and should be – protected by the NLRA. Support for a union, or the intent to organize an employer, is simply not disloyalty to the employer.

H.R. 1793 would turn the NLRA on its head and erode seriously the fundamental right of employees to organize. Therefore, on behalf of the fifteen national and international unions representing millions of employees, I urge you to reject H.R. 1793, the misnamed Truth in Employment Act of 2003.

STATEMENT BY

Leonard & Carol Cloninger
President & Vice President
Construction Electric

On Behalf of
The Independent Electrical Contractors, Inc.

Before
The Subcommittee on Workforce, Empowerment, and Government Programs
Committee on Small Business
U.S. House of Representatives

Regarding
Union Salting of Small Business Worksites

February 26, 2004

My name is Carol Cloninger of Helena, Montana. My husband, Leonard and I owned Construction Electric in Helena. We were salted by the International Brotherhood of Electrical Workers (IBEW) in 2001 and eventually lost our company in 2003.

For the purposes of this testimony, I will provide a brief oral summation of what occurred between October 1998 and October 2003 and ask that my written testimony be made part of the record.

Leonard and I founded Construction Electric in 1989 with one truck and a tool box mainly wiring houses. We grew into a business with nine electricians, a bookkeeper/office manager, four trucks, and an electrical shop in Helena. Our company is what you would consider the quintessential American small business.

The IBEW Targets Our Company

In October 1998, we began receiving written complaints from the Montana Electrical Board that originated from a local IBEW organizer, alleging that our company used unlicensed people and electricians to do electrical work.

The first complaint was received on October 19, 1998 alleging that one of our employees was unlicensed and doing electrical work. This complaint was dismissed because the employee in question was not doing electrical work, but only helping my husband retrieve tools and materials. This complaint also sought to restrict Construction Electric from hiring apprentices because they wanted to limit the size of our company as they saw us as a viable threat to union jobs. This allegation was untrue because our two other electricians (an apprentice and journeyman) had sufficient work to keep them busy.

The Montana Electrical Board Screening Panel reviewed the complaint and voted to dismiss the complaint without prejudice with a letter of warning that any further violations of the

In August 2001, our company dismissed two employees for poor performance. One electrician refused to go into a crawl space when asked to do his work and acted inappropriately while using the company truck. Being a small company, we could not afford the risk of having an employee that refused to do some of his work and portrayed the company in a negative light. He was dismissed and tried to file an NLRB charge but was unsuccessful because he missed the deadline.

The second electrician came to work for two to three weeks. It was clear that he was a bad match for our company. He was not working on the job and costing us money. He performed poorly while working on a small job. When the job was finished, additional work was not readily available. Combined with this, the employee worked slowly and ended up costing the company money.

My husband and I later learned that these two electricians were union salts. At this point, we had quite a bit of work but were not familiar with the techniques of the IBEW and those associated with union salting.

At our peak, we had five full-time employees and would supplement these employees from other contractors as needed based on the work we received. In September 2001, we had a lot of work and needed more employees. We ran an ad in the paper for an electrician. We received applications in the mail in response to the ad. The first application was from the same union organizer who had been filing the complaints against us since 1998 with the Montana Electrical Board. At this point, we hired a local labor attorney from Missoula, MT to provide counsel on what we should do. His advice was not to hire this person for it would be a conflict of interest. We thought we should hire him but counsel suggested otherwise given the previous complaints filed against our company.

Upon receiving his application, knowing his history and that he was not interested in working for our company we set his application aside and considered others. We received four applications and based on their qualifications, we interviewed two. We offered the position to an electrician from Great Falls, but he declined saying it was too far to drive.

We later learned that the applicant who declined the position was what is known as a covert salt. This means that the individual belongs to a labor union but does not identify his affiliation with the union when he seeks employment at a non-union company.

The second individual was interviewed over the phone. He accepted the position and said he would be able to begin work almost immediately. Nothing in his application indicated that he was a union organizer from another town 150 miles away. We still would have hired him even if we knew he was a union member. He only worked for one day and quit. As he stated in NLRB testimony his role as a covert salt had been accomplished.

Another application very similar to the first one was received from Billings, MT via registered mail. The objective section of his application stated:

"My objective is first to make my employer profitable by adding my experience, hard work and dependability to the electrical team. My second objective is to organize the employees of my employer

In April 2003, we discussed our options with our attorney and decided the best thing was to close the business and pay off our debts. Due to the economy, the continuing harassment with the union and our mounting debts led to the only decision which was to close our doors.

We completed our contracts and miscellaneous jobs and were targeting to close our doors on May 1, 2003. The NLRB received information of our intentions to go out of business and issued a restraining order against my husband, prohibiting us from liquidating the company's assets. The restraining order also mandated that we set up an escrow account in order to provide the $42,000 in back pay.

The NLRB then chose to confiscate our bank account and remaining accounts receivable to a total of $32,000. Our attorney advised that we needed to reach a settlement, otherwise we would go into bankruptcy and Leonard would likely end up in jail. We agreed to settle the dispute for $32,000 but refused to admit we were guilty of discrimination. The NLRB accepted this and closed the case while we were forced to close our doors.

In October 2003, we filed complaints with the Montana State Electrical Board against the five electricians involved in this case. The complaints clearly outlined their unprofessional conduct by misrepresenting their electrical licenses as non bona fide applicants for employment. State statutes provide that electrical licenses can be revoked if they presented themselves or their licenses in a false or misleading manner. As the complaints went through the process and the electricians received notice, the IBEW organizer filed yet another NLRB complaint against my husband and I, citing further discrimination by retaliatory actions with the complaints and asked for injunctive relief. With minimal resources to keep fighting the issue, we decided to withdraw the complaints and get on with our lives.

Conclusion

To summarize these events, we can say we had a terrible injustice done to us, and our loyal employees as well as the business as a whole by those individuals who wished to do us harm. They manipulated the facts and the laws by not being bona fide applicants. The deck is clearly stacked against the employer when it comes to the NLRB and we are here today to urge you to pass Mr. DeMint's bill the *"Truth in Employment Act of 2003"* (H.R. 1793) and remedy this unjust situation.

It is especially important that Congress act now because in a speech last spring, IBEW President Ed Hill made salting campaigns a number one priority for IBEW locals. As the IBEW steps up this effort, it is our wish that all small businesses in the construction trades be on guard and aware that these campaigns can and will drive you out of business if given the opportunity.

Testimony of Mark Mix
in support of H.R. 1793
the Truth in Employment Act of 2003
before the House Business Committee's
Subcommittee on Workforce, Empowerment,
and Government Programs
on February 26, 2004

Mr. Chairman, members of the Committee, thank you for the opportunity to speak before you today.

My name is Mark Mix, and I am the President of the National Right to Work Committee. The Committee is a 2.2 million member grassroots organization dedicated to the principle that everyone must have the right, but no one should be forced, to join or financially support a labor union just to get or keep a job.

The National Right to Work Committee supports H.R. 1793, the Truth in Employment Act, and commends Congressman Jim DeMint and this committee for shedding light on this important issue.

I'd like to talk to you briefly about how "salting" works: When a small, growing company runs ads seeking to hire new employees, union officials identify that business as a target to expand their forced-unionism empire.

They send in one, or even a large group, of job applicants who openly identify themselves as "union organizers."

If the employer hires the union "salts," who are often paid union employees, union officials attempt to instigate a quick-snap National Labor Relations Board "representation" election. This so-called election then locks compulsory unionism on yet another company. Or, if they fail at that, they begin to sabotage the employer's business and manufacture a blizzard of unfair labor practice charges to bury the employer with legal fees until he signs over his employees.

On the other hand, if the employer doesn't hire the union-planted applicants, then a series of unfair labor practice charges are filed, and again the employer is faced with the potential for huge legal costs.

Either way, the company's choice will be either not to expand, or if they do seek new employees, to face a union "salting" campaign.

Either way, the employers and employees both lose in the end. Either unwanted monopoly bargaining is forced on another small business, which turns over control of its employees, or union lawyers bleed the company dry with unfair lawsuits.

Unbelievably, "salting" is currently sanctioned under the NLRA.

As it stands today, "salting" is protected by flawed interpretations of Section 8(a) of the National Labor Relations Act. Small Business owners are continuously brought up on "unfair labor" charges for insisting employees focus primarily on the job they are actually being paid to do.

To give you a real life example of what employers and employees face, I'd like to recount two stories.

Take the case of Randy Truckenbrodt, owner of a non-union equipment rental company in Illinois, who fought to save his business from union bosses' "salting" tactics.

A union "salt" applied for a job with Mr. Truckenbrodt's firm and was hired.

Within months, using company information provided by the "salt," union officials and agents began following Mr. Truckenbrodt's employees as they delivered their products to client businesses.

They warned customers that they would face picketing and strikes unless they stopped buying and renting from Mr. Truckenbrodt.

Union members also picketed in front of Mr. Truckenbrodt's offices 24 hours a day, seven days a week for months. This salting campaign cost the firm $600,000 in lost revenue from intimidated customers.

In addition to these intimidation tactics, Mr. Truckenbrodt's company was directly vandalized dozens of times during the union's so-called "organizing" drive.

Vehicle tires were slashed, electrical cables were cut, and truck windows were broken, all during the union's effort to force union control over the company's employees.

In the 23 years prior to the organizing drive, there had never been a recorded incident of vandalism at Mr. Truckenbrodt's firm.

While this destruction was taking place, the union "salt" filed multiple false "unfair labor practice" charges against Mr. Truckenbrodt's company, all of which were eventually dismissed, but at a cost of tens of thousands of dollars in legal fees.

The business survived the "salting" campaign and he and the company employees are still able to provide for their families.

Let me now tell you about Charley Walz, who runs a masonry company in Nebraska.

Charley started out in the trades as a union man, but soon he figured out he could provide better service at lower prices for customers by going out on his own, union-free.

Charley wanted his piece of the American dream, and like many hard-working Americans, he started his own company to make that dream a reality.

Before long, his company was flourishing. His clients were happy and so were his small but growing army of employees.

But Charley's success came with a price.

The bigger Charley's company grew, the more union officials wanted to force his employees under union monopoly "representation."

When Charley's employees resisted the unwanted advances of union organizers, the "salting" started.

Charley's company was fined $20,000 by the NLRB (after having spent double that amount on legal expenses) for failing to hire union "salts."

Yet, video taped evidence, supplied by Charley's lawyers, showed that the union "salts" had refused job applications that were offered to them by Charley's daughter.

Charley is still in business. He was able to survive the union's "salting" campaign, but many are not so lucky.

Whether small businesses resist "salting" and are subjected to potentially ruinous legal costs and fines, or acquiesce to union-monopoly control, their employees suffer.

The Truth in Employment Act of 2003, introduced by Congressman Jim DeMint of South Carolina, would protect employers and employees by making it clear that an employer is not required to hire any person that does not have an honest interest in working for the employer.

The bill states that someone is not a "bona fide" applicant if such person "seeks or has sought employment with the employer in furtherance of other employment or agency status." Simply put, if someone wants a job, but his true intent is not to work for the employer, then they should not get the

job, and the employer has not committed an unfair labor practice by refusing to hire the person.

This bill does not infringe on the rights of "bona fide" employees and employee applicants to organize on behalf of unions in the workplace.

In closing, Mr. Chairman, forcing employers to hire union business agents or others, who are primarily intent on disrupting or even destroying a business, does not serve the interests of "bona fide" employees under the NLRA and hurts the competitiveness of small businesses and their employees.

The Truth in Employment Act of 2003 returns a sense of balance to the NLRA, which is being undermined by the NLRB's current policies. Therefore, I urge Congress to take immediate action to pass this vital piece of legislation.

National Right to Work Committee

A COALITION OF EMPLOYEES AND EMPLOYERS
NATIONAL HEADQUARTERS BUILDING

February 24, 2004

The Hon. W. Todd Akin
United States House of Representatives
117 Cannon HOB
Washington, DC 20515

Re: House Resolution 1793 **Position: Support**

Dear Chairman Akin:

On behalf of the nearly 2.2 million members and supporters of the National Right to Work Committee, I urge you to support House Resolution 1793.

H.R. 1793, the Truth in Employment Act of 2003, was introduced by Rep. Jim DeMint as a measure to protect employers and honest employees by making it clear that an employer is not required to hire any person who does not have an honest interest in working for the employer.

This bill sheds the light of truth on the important issue of "salting."

Here's how "salting" works: When a small, growing company looks to expand, union officials target that business for their next "salting" campaign.

Initially, they send in job applicants who openly identify themselves as "union organizers."

If the employer hires the union "salts," who are actually paid union employees, union officials instigate a quick-snap National Labor Relations Board (NLRB) "representation" election. This so-called election then forces compulsory unionism on yet another company.

Or, if they fail at that, they begin to sabotage their employer's business.

If the employer refuses to hire the union-planted applicants, or when they later turn out to be poor employees, and he dares to fire them, union lawyers file a litany of unfair labor charges.

The company's choice will be either not to expand, or if they do seek new employees, to face a union "salting" campaign.

Either way, the employers and employees both lose in the end. Either unwanted monopoly bargaining is forced on another small business, or union lawyers bleed the company dry with unfair lawsuits.

The problem is that "salting" is currently sanctioned by law, thanks to a ruling by the NLRB.

Federal law should not force any employer to hire union "salts" whose goal is to put him and his honest employees out of business just because they reject the union bosses' interference with their livelihood.

The Truth in Employment Act of 2003 simply states that someone is not a "bona fide" applicant if such person "seeks or has sought employment with the employer in furtherance of other employment or agency status."

This legislation removes the protection of Section 8(a) of the National Labor Relations Act (NLRA) from a person who seeks a job without an honest motivation to work for the employer.

Contrary to union officals' claims, this bill will not affect the rights available under the NLRA to anyone, provided they are a "bona fide" employee applicant.

Employees with the honest intent to work for an employer will continue to possess their right to organize, and employers will still be prohibited from discriminating against employees on the basis of union membership or union activism.

H.R. 1793 does not infringe on the rights of "bona fide" employees and employee applicants to organize on behalf of unions in the workplace.

This bill does not prohibit organizers from getting jobs, and it is completely consistent with the policies of the NLRA. All this legislation does is give the employer some comfort that he or she is hiring someone who really wants to do an honest day's work for an honest day's pay.

The Truth in Employment Act of 2003 returns a sense of balance to the NLRA, which is being undermined by the National Labor Relation Board's current policies.

In the interests of fairness and good public policy, I urge Congress to take immediate action and pass H.R. 1793.

Sincerely,

Mark Mix
President

MAM/nar

○